



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

Gertrude Casselle
Complainant

Complaint No. 2008-247

v.

New Jersey Department of Human Services,
Division of Family Development
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or 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). *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-85 (June 2009).
2. Although the Custodian provided a written response to the Complainant’s amended request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, amended request Items No. 1 through No. 4 are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).
3. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he failed to respond to the Complainant’s request in writing within the statutorily-mandated seven (7) business days and provided an insufficient response to the Complainant’s amended request items on October 2, 2008, the Custodian did not unlawfully deny access to the records responsive to request



Items No. 1 through No. 4 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

4. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant's amended OPRA request Items No. 5 and No. 7 are invalid under OPRA and the Custodian had no legal duty to research his records to locate records potentially responsive to the Complainant's request items 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 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). See Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame, the Custodian did respond in writing to the Complainant's amended OPRA request on October 2, 2008 stating that New Jersey Division of Family Development is not the custodial agency for Equal Employment Opportunity complaint files, and subsequently certified on October 2, 2009 that no records responsive to the Complainant's amended request item exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he did not unlawfully deny access to the Equal Employment Opportunity complaint report and findings pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial and although the Custodian provided an insufficient response to the Complainant's amended request Items No. 1 through No. 4 on October 2, 2008, because the Custodian certified that he provided all records responsive to the Complainant's amended request Items No. 1 through No. 4 on October 28, 2008 and certified that no records responsive to amended request Item No. 6 exist, and because amended request Items No. 5 and No. 7 are invalid under OPRA, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within

forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 18th 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.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Gertrude Casselle¹
Complainant**

GRC Complaint No. 2008-247

v.

**New Jersey Department of Human Services,
Division of Family Development²
Custodian of Records**

Records Relevant to Complaint: Inspection of all information, including e-mails, investigative findings, and meeting minutes, pertaining to the transfer of the Administration of the Low Income Home Energy and Universal Service Fund (“USF”) programs from the New Jersey Department of Human Services (“DHS”) to the New Jersey Department of Community Affairs (“DCA”). Also, the divisional organizational chart of the New Jersey Division of Family Development (“DFD”) for the periods covering September 1, 2006 to September 1, 2007.

Request Made: September 10, 2008

Response Made: September 25, 2008

Custodian: John Zajac

GRC Complaint Filed: October 23, 2008³

Background

September 10, 2008

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

September 11, 2008

E-mail from Ms. Elena Flynn (“Ms. Flynn”), Legal Compliance Officer, to the Custodian. Ms. Flynn states that the Complainant’s request has been received. Ms. Flynn states that the Complainant’s request fails to identify specific government records as required in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), with the exception of the request for the DFD organizational charts.

¹ No legal representation listed on record.

² Represented by DAG Michael Kennedy, on behalf of the NJ Attorney General.

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

Ms. Flynn advises that prior to denying access to the Complainant's OPRA request, the Custodian should contact the Complainant and attempt to narrow the scope of the request.

September 25, 2008

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request.⁴ The Custodian requests that the Complainant clarify her request, with the exception of the divisional organizational chart.⁵

September 25, 2008

E-mail from the Custodian to Jeanette Page-Hawkins ("Ms. Page-Hawkins"), Director of the DFD. The Custodian states that he spoke with the Complainant in order to narrow her OPRA request and will keep Ms. Page-Hawkins updated as to the status of the request.

September 30, 2008

E-mail from the Complainant to the Custodian. The Complainant amends her September 10, 2008 OPRA request:

1. USF Budget submitted by DHS to Board of Public Utilities ("BPU") for 2006 and 2007.
2. Memorandum of Understanding ("MOU") between DHS and BPU for 2006 and 2007.
3. Organizational Chart for 2006.
4. Supervisory Program Support Specialist ("SPSS") Eligibility List (Current Status) including number and names of appointees and rank at the time of the appointment.
5. E-mails, memos and Union (Tom Palermo) correspondences.
6. Equal Employment Opportunity ("EEO") (John McCabe) investigation of complaint report and findings.
7. Case history of Human Resources ("HR") prevailing in support of SPSS supervising program.

October 2, 2008

Custodian's response to the amended OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.

The Custodian states that he has requested the first four (4) items of the Complainant's amended OPRA request and will advise how many pages the documents total. The Custodian directs the Complainant to the website for Central Office because

⁴ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on September 11, 2008.

⁵ The Custodian also includes in the Statement of Information a copy of the "Government Records Request Receipt" forwarded to the Complainant on September 25, 2008. However, the "Government Records Receipt" does not indicate that the Custodian sought clarification of the Complainant's request, just that the request has been marked as "in Progress."

the Central Office is responsible for conducting EEO investigations and is the custodian of records for the investigations and reports requested in Item No. 6.

The Custodian requests additional clarification regarding revised request Item No. 5 and No. 7. The Custodian asks if the Complainant is requesting that a case history regarding the Complainant's case be created.

October 2, 2008

E-mail from the Complainant to the Custodian. The Complainant states that she is requesting all e-mails, memos and correspondence relating to a matter involving the Complainant. The Complainant states that the request is not limited to Tom Palermo, but should include a number of other personnel.

The Complainant further advises that she does not want the Custodian to create a case history, which is outside of the Custodian's duties under OPRA. The Complainant states that she wants records involving an appeals complaint in which the DFD/HR prevailed in their argument that a SPSS may supervise a "unit of professionals or supervise a 'program.'" The Complainant states that if the Custodian cannot locate any records based on not having the case name, then there is no problem.

October 15, 2008

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian advise as to the status of the Complainant's amended OPRA request.

October 15, 2008

E-mail from the Custodian to the Complainant. The Custodian advises that he will follow up with the appropriate personnel.

October 22, 2008

E-mail from the Complainant to the Custodian. The Complainant states that the extended deadline to respond to the Complainant's revised OPRA request has passed. The Complainant requests that the Custodian advise whether the DFD's lack of adherence to the extended deadline is a denial of access.

October 23, 2008

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

- Complainant's OPRA request dated September 10, 2008.
- E-mail from the Complainant to the Custodian dated September 30, 2008.
- E-mail from the Custodian to the Complainant dated October 2, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from the Complainant to the Custodian dated October 22, 2008.

The Complainant states that she submitted an OPRA request to the DFD on September 10, 2008. The Complainant avers that she received a telephone call from the

Custodian requesting clarification of her request and that she provided an amended list of records being requested to the Custodian via e-mail on September 30, 2008.⁶

The Complainant avers that the Custodian e-mailed the Complainant on October 2, 2008 to advise as to the status of the Complainant's revised request items, but failed to provide any records responsive as of October 22, 2008.

The Complainant did not agree to mediate this complaint.

October 23, 2008

E-mail from the Custodian to the Complainant. The Custodian states that he is attempting to procure budget information and will provide an update in the afternoon.⁷

October 23, 2008

E-mail from the Custodian to the Complainant attaching an e-mail from the DFD's Fiscal Unit to the Custodian advising that the only MOU available is from 2003. Additionally, the Custodian requests further clarification on which budget records the Complainant is requesting.

October 24, 2008

E-mail from the Custodian to the Complainant. The Custodian states that no denial of access has occurred. The Custodian states that some of the requested records have been difficult to locate because the DFD needs further clarification. The Custodian states he has already responded to the Complainant regarding Item No. 6 of the Complainant's amended request but that the DFD has been delayed in trying to reach out to BPU to confirm the dates of the MOU. The Custodian states that the confirmation was made on October 23, 2008, as per the Custodian's e-mail to the Complainant.

Additionally, the Custodian states that his October 23, 2008 e-mail also requested further clarification as to whether the Complainant wanted 2006/2007 year fiscal or calendar budgets, but he had not received a response from the Complainant. The Custodian states that if the Complainant does not respond by the end of the day, the Custodian will prepare a formal response on October 27, 2008.

October 28, 2008

Letter from the Custodian to the Complainant. The Custodian states that this letter serves as the DFD's response to the Complainant's amended OPRA request.

The Custodian states that he informed the Complainant on September 25, 2008 that this OPRA request, excluding the organizational chart, failed to identify a specific government record as required in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

⁶ The Complainant does not indicate the date on which the Custodian contacted her requesting clarification.

⁷ The Custodian e-mailed the Complainant shortly after requesting that she contact him via telephone.

The Custodian states that the Complainant clarified her request on September 30, 2008. The Custodian states that revised request Items No. 5 and No. 7 for e-mails, memoranda, correspondence and case history fail to identify a specific government records as required by MAG, *supra*, Bent, *supra* and NJ Builders, *supra*.

Additionally, the Custodian states that, as discussed on October 2, 2008, EEO investigations are conducted by DHS's Central Office, and as such, the DFD is not the custodian of the records responsive to amended request Item No. 6. The Custodian states that the Complainant may want to request these records from DHS's Central Office.

The Custodian states that the following records are available for inspection:

- DFD table of organization 2007.
- DFD Director's office table of organization (undated).
- DFD Low Income Energy Assistance Program and USF table of organization.
- MOU between DHS and BPU 2003.
- Certification list for SPSS.
- USF program administration cost projection FY2006.

The Custodian advises the Complainant that the records responsive are also available for copying at a cost of \$9.50.

October 29, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

November 6, 2008

Custodian's SOI with the following attachments:

- E-mail from Ms. Flynn to the Custodian dated September 11, 2008.
- E-mail from the Custodian to Ms. Page-Hawkins dated September 25, 2008.
- "Government Records Request Receipt" dated September 25, 2008.
- E-mail from the Complainant to the Custodian dated September 25, 2008.
- E-mail from the Custodian to the Complainant dated October 2, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from the Custodian to the Complainant dated October 15, 2008.
- E-mail from Complainant to the Custodian dated October 22, 2008.
- E-mail from Custodian to the Complainant dated October 23, 2008.
- E-mail from Custodian to the Complainant dated October 23, 2008 attaching an e-mail from the Fiscal Unit to the Custodian.
- E-mail from the Custodian to the Complainant dated October 24, 2008.
- Letter from the Custodian to the Complainant dated October 28, 2008.⁸

⁸ The Custodian attached additional correspondence between himself and employees of DHS and the DFD that is not relevant to the adjudication of the instant complaint.

The Custodian certifies that no records were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).⁹

The Custodian certifies that he received the Complainant’s request on September 11, 2008. The Custodian avers that he contacted the Complainant verbally to request an extension of time to respond and advised that the Complainant would need to clarify her request with the exception of the DFD organizational charts. The Custodian avers that the Complainant verbally advised the Custodian that she would respond to the Custodian’s request for clarification via e-mail.

The Custodian certifies that the Complainant provided a revised list of seven (7) request items via e-mail on September 30, 2008. The Custodian certifies that he responded in writing to the Complainant on October 2, 2008, stating that records responsive to the first four (4) request items had been requested from their respective divisions within DHS and that he would advise as to how many pages of records will be made available. The Custodian certifies that he also informed the Complainant that the records responsive to request Item No. 6 for EEO investigation records are not maintained by the Custodian and that the Complainant should request such records from DHS’s Central Office. The Custodian certifies that he also requested additional clarification of request Items No. 5 and No. 7.

The Custodian certifies that the Complainant responded on October 15, 2008 stating that she provided as much clarification as possible. The Custodian certifies that he informed the Complainant on the same date that he would follow up with the appropriate personnel regarding the Complainant’s outstanding request items. The Custodian certifies that he was informed by the DFD’s Fiscal Unit that they were having difficulty locating an MOU responsive to the Complainant’s revised request Item No. 2 and were contacting BPU for additional clarification. The Custodian certifies that the DFD received confirmation from BPU on October 23, 2008 that no record responsive exists and that the most recent MOU is from 2003.

The Custodian certifies that he responded to the Complainant’s October 22, 2008 e-mail accusing the Custodian of denying access to her revised request on October 24, 2008 informing the Complainant that there has been no denial of access, rather, some of the records responsive to the revised request were difficult to locate. The Custodian further certifies that he requested clarification of revised request Item No. 1 and that if he received no response from the Complainant, a formal response would be prepared. The Custodian certifies that said response was mailed to the Complainant on October 28, 2008.

The Custodian argues that he initially responded to the Complainant requesting additional clarification and an extension of time to respond, whereupon he made all reasonable attempts to obtain the records responsive. Additionally, the Custodian argues that the Complainant provided the DFD with dates of an MOU that required the DFD to

⁹ The Custodian does not specifically indicate how he searched for any records responsive.
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request verification from another department, which resulted in the request being delayed.

The Custodian contends that all attempts were made to expeditiously advise the Complainant of the status of her complaint. The Custodian contends that he communicated with the Complainant regularly via telephone, e-mail and letter. The Custodian asserts that the attached e-mails support the good faith effort the Custodian undertook to satisfy the Complainant's OPRA request.

September 23, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that upon further review of the instant complaint, the GRC requests that the Custodian certify to the following:

1. Whether all records responsive to request Items No. 1 through No. 4 of the Complainant amended OPRA request were provided and no other records responsive exist?
2. Whether any records responsive to request Item No. 6 of the Complainant's revised request exist?

The GRC requests that the Custodian provide the requested legal certification by September 25, 2009.

September 23, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until October 3, 2009 to submit the requested legal certification.

September 23, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until October 3, 2009 to submit the requested legal certification.

October 2, 2009

Custodian's legal certification. The Custodian certifies that all records responsive to request Items No. 1 through No. 4 of the Complainant's amended OPRA request were provided and no other records responsive exist. Additionally, the Custodian certifies that no records responsive to request Item No. 6 of the Complainant's amended request exist.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

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

Further, 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 ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...* If the government record is in storage or archived, the requestor shall be so *advised within seven business days after the custodian receives 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.

The GRC first turns to the issue of whether the Custodian responded sufficiently to the Complainant's OPRA request in a timely manner.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ 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).

Additionally, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-85 (June 2009), the Custodian responded verbally on the twentieth (20th) business day after receipt of the Complainant's request, requesting an extension of time to respond. The Council held that

"... N.J.S.A. 47:1A-5.i. is specific regarding the duty of a custodian to respond in writing within the statutorily mandated seven (7) business day time frame when responding to an official OPRA request for government records. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days 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, supra."

The Custodian's response in this complaint is factually similar to the Custodian's response in Verry, supra. Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on September 11, 2008 and responded verbally, requesting clarification and an extension of time on September 25, 2008.

Therefore, the Custodian's failure to respond in writing to the Complainant's 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. See also Verry, supra.

Next, the GRC examines whether there was an unlawful denial of access because the Custodian denied access to records responsive to the Complainant's amended request.

¹⁰ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Amended Request Items No. 1 through No. 4:

The Custodian's October 2, 2008 response did not grant access, deny access, seek clarification or request an extension of time; rather, the Custodian advised the Complainant that he had requested records responsive to the first four (4) request items from the officials who held actual, physical custody of those records. The Custodian did not grant access to the records responsive to the Complainant's amended request items until October 28, 2008, almost one (1) month following the date of the Complainant's amended request.

In Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007), the Custodian provided a written response to the Complainant's request; however, said response did not explicitly grant or deny access to the requested record. The Council held that:

“[a]lthough the Custodian responded in writing within the statutory time period under OPRA the Custodian's response to the request for the sign that references the PHA's desire for Spanish-speaking tenants to bring their own interpreter was so vague that it could not be determined if the requested sign did not exist or if the request was being denied. Therefore, even though the sign was eventually released to the Complainant, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.i.”

In the complaint now before the Council, although the Custodian responded advising that records responsive to the Complainant's four (4) request items had been requested, the Custodian failed to definitively grant access, deny access, seek clarification or request an extension of time to respond within seven (7) business days after receipt of the Complainant's amended OPRA request.

Therefore, although the Custodian provided a written response to the Complainant's amended request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, amended request Items No. 1 through No. 4 are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart, *supra*.

Moreover, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian stated in the SOI that one (1) record responsive to the Complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The Complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the Custodian certify as to whether all records responsive had been provided to the Complainant. The Custodian subsequently certified on August 1, 2005 that the record provided to the Complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met

the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In this complaint, the Custodian advised the Complainant on October 2, 2008 that records responsive to request Items No. 1 through No. 4 had been requested from their respective divisions within DHS. The Custodian responded in writing to the Complainant on October 28, 2008, providing access to six (6) records responsive to the Complainant’s amended OPRA request Items No. 1 through No. 4. The Custodian subsequently certified on October 2, 2009 that all records responsive to request Items No. 1 through No. 4 in existence had been provided and there is no credible evidence in the record to refute the Custodians’ certification.

Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he failed to respond to the Complainant’s request in writing within the statutorily-mandated seven (7) business days and provided an insufficient response to the Complainant’s amended request items on October 2, 2008, the Custodian did not unlawfully deny access to the records responsive to request Items No. 1 through No. 4 pursuant to Burns, *supra*.

Amended Request Items No. 5 and No. 7:

The Complainant’s amended OPRA request Items No. 5 and No. 7 sought “[e]-mails, memos and Union (Tom Palermo) correspondences” and a “[c]ase history of HR prevailing in support of SPSS supervising program” respectively.

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),¹¹ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA only 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.”¹²

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² 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 [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office. The GRC reasoned that while the Complainant's request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

"because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra* and Bent, *supra* and the Council's decisions in Asarnow, *supra* and Morgano, *supra*."

The Complainant's amended OPRA request Items No. 5 and No. 7 sought "[e]-mails, memos and Union (Tom Palermo) correspondences" and a "[c]ase history of HR prevailing in support of SPSS supervising program" respectively. As in Feiler-Jampel, *supra*, the Complainant's OPRA request in this complaint is a blanket request for a class of various documents rather than a request for specifically named or identifiable government records.

Therefore, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant's OPRA request Items No. 5 and No. 7 are invalid under OPRA and the Custodian had no legal duty to research

his records to locate records potentially responsive to the Complainant's request items pursuant to MAG, supra, Bent, supra, and New Jersey Builders Association, supra. See Feiler-Jampel, supra. See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Amended Request Item No. 6:

The Custodian responded in writing to the Complainant's request on October 2, 2008 indicating that the DFD is not the custodial agency of EEO complaint files and subsequently certified on October 2, 2009 that no records responsive to the Complainant's amended request Item No. 6 exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Similarly in this complaint, although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame, the Custodian did respond in writing to the Complainant's amended OPRA request on October 2, 2008 stating that DFD is not the custodial agency for EEO complaint files, and subsequently certified on October 2, 2009 that no records responsive to the Complainant's amended request Item No. 6 exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he did not unlawfully deny access to the EEO complaint report and findings pursuant to Pusterhofer, supra.

Whether the Custodian's untimely, insufficient response and untimely access to records requested in Items No. 1 through No. 4 of the Complainant's amended OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to

have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial and although the Custodian provided an insufficient response to the Complainant’s amended request Items No. 1 through No. 4 on October 2, 2008, because the Custodian certified that he provided all records responsive to the Complainant’s amended request Item No. 1 through No. 4 on October 28, 2008 and certified that no records responsive to amended request Item No. 6 exist, and because amended request Items No. 5 and No. 7 are invalid under OPRA, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or 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). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-85 (June 2009).
2. Although the Custodian provided a written response to the Complainant’s amended request within the statutorily mandated seven (7) business days, said response is insufficient pursuant to OPRA because it does not grant access,

deny access, seek clarification, or request an extension of time. Thus, amended request Items No. 1 through No. 4 are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).

3. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he failed to respond to the Complainant’s request in writing within the statutorily-mandated seven (7) business days and provided an insufficient response to the Complainant’s amended request items on October 2, 2008, the Custodian did not unlawfully deny access to the records responsive to request Items No. 1 through No. 4 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant’s amended OPRA request Items No. 5 and No. 7 are invalid under OPRA and the Custodian had no legal duty to research his records to locate records potentially responsive to the Complainant’s request items 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 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). *See Feiler-Jampel v. Somerset County Prosecutor’s Office*, GRC Complaint No. 2007-190 (March 2008). *See also: Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007).
5. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, the Custodian did respond in writing to the Complainant’s amended OPRA request on October 2, 2008 stating that New Jersey Division of Family Development is not the custodial agency for Equal Employment Opportunity complaint files, and subsequently certified on October 2, 2009 that no records responsive to the Complainant’s amended request item exist and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he did not unlawfully deny access to the Equal Employment Opportunity complaint report and findings pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial and although the Custodian provided an insufficient response to the Complainant’s amended request Items No. 1 through No. 4 on October 2, 2008, because the Custodian certified that he provided all records responsive to the Complainant’s amended request Items No. 1 through No. 4 on October 28, 2008 and certified that no records responsive to amended request Item No. 6 exist, and because amended request Items No. 5 and No. 7 are invalid under OPRA, it is

concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

November 10, 2009