



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Gertrude Casselle
Complainant

Complaint No. 2008-248

v.

New Jersey Department of Community Affairs,
Division of Community Resources
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant’s request in this complaint is a blanket request for a class of various documents over an unspecified time period rather than a request for specifically named or identifiable government records, the Complainant’s request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is 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, 37 (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).
2. The Custodian’s failure to respond in writing to the Complainant’s September 30, 2008 supplemental OPRA request (for organizational charts, the memorandum of Understanding between the New Jersey Department of Community Affairs and accompanying budget for 2006, 2007 and 2008) either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days and insufficient response (to the Memorandum of Understanding and budgets for 2007 and 2008) under OPRA because such did not grant access, deny access, seek clarification, or request an extension of time 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).



3. Because the Custodian conducted a reasonable search for the requested divisional organizational charts and because the Custodian certified that the New Jersey Department of Community Affairs, Human Resources Office initially confirmed that the requested charts would be provided to the Complainant as part of their response, the Custodian did not unlawfully deny access to said charts and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
4. The Custodian provided access to records on September 30, 2008, organizational charts on October 20, 2008 and the Memorandum of Understanding and 2007 and 2008 budgets on October 23, 2008. The Custodian subsequently certified in the Statement of Information that all records responsive to the Complainant's request had been provided and there is no credible evidence in the record to refute the Custodians' certification. Therefore, the Custodian did not unlawfully deny access to any records responsive pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Although the Custodian's failure to provide a written response to the Complainant's supplemental OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, and although the Custodian provided an untimely and insufficient response to the Complainant's supplemental request, because the Custodian certified that he provided all records responsive to the Complainant's supplemental OPRA request, the Custodian conducted a reasonable search for the divisional organizational charts and because the Complainant's initial OPRA request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is invalid, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Gertrude Casselle¹
Complainant**

GRC Complaint No. 2008-248

v.

**New Jersey Department of Community Affairs,
Division of Community Resources²
Custodian of Records**

Records Relevant to Complaint: Inspection of all information, including e-mails, investigative findings, and meeting minutes, related to the transfer of the Administration of the Low Income Home Energy Assistance Program (“LIHEAP”) and Universal Service Fund (“USF”) programs from the New Jersey Department of Human Services (“DHS”) to the New Jersey Department of Community Affairs (“DCA”) in December 2006. Also, the divisional organizational chart of the New Jersey Division of Community Resources (“DCR”) for the periods covering December 2006 to December 2008.

Request Made: September 10, 2008

Response Made: September 26, 2008

Custodian: Robert N. Wright, Jr.³

GRC Complaint Filed: October 23, 2008⁴

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 26, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request.⁵ The Custodian states that seven (7) records responsive to the Complainant’s request have been located. The Custodian states that four (4) of the records contain

¹ No legal representation listed on record.

² Represented by AAG Donald M. Palombi, on behalf of the NJ Attorney General.

³ The new Custodian of Record as of January 1, 2012 is Ms. Roseanne Rizza, who had no involvement in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian certified in the Statement of Information that the Complainant’s OPRA request was received on September 19, 2008.

redactions for information considered to be advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1. and one (1) record has been redacted in its entirety under the same exemption. The Custodian requests that the Complainant contact him to schedule an appointment to review the records responsive.

Additionally, the Custodian states that the divisional organizational charts are housed at the DCA Human Resources (“HR”) office and that he understands that the Complainant has already submitted a separate OPRA request to HR. The Custodian states that HR will provide any responsive records to the Complainant.

September 29, 2008

E-mail from the Complainant to the Custodian. The Complainant requests that she inspect the records responsive to her request at 1:00 p.m. on September 30, 2008.

September 29, 2008

E-mail from the Custodian to the Complainant. The Custodian states that a conference room has been reserved from 1:00 p.m. to 2:00 p.m. on September 30, 2008 so that the Complainant may review the records responsive. The Custodian states that additional arrangements can be made if the Complainant needs more than an hour to inspect the records.

September 30, 2008

Complainant’s handwritten supplemental OPRA request. The Complainant requests the following in a handwritten list:

- Memorandum of Understanding (“MOU”) between Board of Public Utilities (“BPU”) and DCA.
- DCR organizational chart for 2006 and 2007.
- DCA budget submitted to BPU for USF for 2007 and 2008.

October 20, 2008

The Custodian’s response to the supplemental OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the thirteenth (13th) business day following receipt of such request. The Custodian states that attached are two (2) e-mails and two (2) organizational charts which are responsive to the Complainant’s supplemental OPRA request. The Custodian states that he will inquire further about the MOU between the BPU and DCA and accompanying budget for the years 2006, 2007 and 2008.⁶ The Custodian states that if these records are not maintained by the DCR, he will inform the Complainant of such.

October 20, 2008

E-mail from the Complainant to the Custodian. The Complainant confirms that she has reviewed the records attached to the Custodian’s e-mail dated October 20, 2008 and made nine (9) copies.

⁶ Although the Custodian advised the Complainant that he would inquire about an accompanying budget for 2006, the Complainant did not request said record in her September 30, 2008 supplemental request. Gertrude Casselle v. New Jersey Department of Community Affairs, Division of Community Resources, 2008-248 – Findings and Recommendations of the Executive Director 2

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 Custodian to the Complainant dated September 26, 2008 attaching a “Government Records Request Receipt.”
- E-mail from the Custodian to the Complainant dated October 20, 2008 attaching additional records responsive.
- E-mail from the Complainant to the Custodian dated October 20, 2008.

The Complainant states that she submitted an OPRA request to the Custodian on September 10, 2008. The Complainant states that the Custodian responded in writing on September 26, 2008 and October 20, 2008 providing access to records responsive.

The Complainant contends that the Custodian failed to provide access to any MOUs between the BPU and DCA for the budget years 2006, 2007 and 2008.⁷

The Complainant does not agree to mediate this complaint.

October 23, 2008

E-mail from the Custodian to the Complainant attaching the following:

- MOU between BPU and DCA dated December 2006.
- SFY 2007 Budget submitted to BPU.
- Order approving SFY 2007 Budget dated July 11, 2007.
- SFY 2008 Budget submitted to BPU.

The Custodian states that he believes these documents complete the Complainant’s supplemental request. The Custodian states that he will inform the Complainant of copying costs and make such copies available upon receipt of payment.

October 29, 2008

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

November 5, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated September 10, 2008.
- E-mail from the Custodian to the Complainant dated September 26, 2008 attaching a “Government Records Request Receipt.”
- E-mail from the Complainant to the Custodian dated September 29, 2008.
- E-mail from the Custodian to the Complainant dated September 29, 2008.
- E-mail from the Custodian to the Complainant dated October 20, 2008.

⁷ The Complainant does not dispute redactions made to records provided.

- E-mail from the Custodian to the Complainant dated October 23, 2008 attaching four (4) records.
- Complainant's supplemental OPRA request undated.

The Custodian certifies that his search for the requested records included Richard Z. Osworth ("Mr. Osworth"), Director of the DCR, reviewing his files and performing an electronic search of his e-mail folders.⁸ The Custodian certifies that the DCR also reviewed a binder kept by Maryann Barkus ("Ms. Barkus"), Manager of the Community Services Element, relating to the USF and LIHEAP.

The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on September 19, 2008. The Custodian certifies that he responded in writing to the Complainant on September 26, 2008 providing access to seven (7) records, some with redactions. The Custodian certifies that the Complainant reviewed the records on September 30, 2008 and made a supplemental OPRA request for the following:

- MOU between BPU and DCA.
- DCR organizational chart for 2006 and 2007.
- DCA budget submitted to BPU for USF for 2007 and 2008.

The Custodian certifies that he provided additional records responsive to both the Complainant's original OPRA request and supplemental request via e-mail on October 20, 2008 and October 23, 2008 respectively.

The Custodian certifies that all records responsive within the DCR's possession were provided to the Complainant. The Custodian states that the Complainant's Denial of Access Complaint asserted that the Custodian failed to produce "MOU & Budget [between] DCA & BPU [2006, 2007 and 2008]." The Custodian certifies that he provided access to the following on October 23, 2008:

- MOU between BPU and DCA dated December 2006.
- SFY 2007 Budget submitted to BPU.
- Order approving SFY 2007 Budget dated July 11, 2007.
- SFY 2008 Budget submitted to BPU.

The Custodian certifies that DCR did not take over the administration of the USF and LIHEAP until December 2006; therefore, the SFY 2007 budget is the earliest budget in the DCR's possession. The Custodian contends that he did not indicate to the Complainant that no 2006 budget existed because the Complainant did not request a 2006 budget in her handwritten supplemental request.

⁸ The Custodian notes that Mr. Osworth encountered technical problems while performing the electronic search that required technical support staff to resolve.
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Further, the Custodian certifies that the review of records was complicated by technical problems with Mr. Osworth's e-mail and Ms. Barkus's vacation from September 10, 2008 through September 22, 2008 and again in early October.

Finally, the Custodian certifies that the DCR has reviewed all records in its possession and made all records responsive to the Complainant's request available to her. The Custodian requests that this complaint be dismissed.

October 1, 2009

E-mail from the GRC to the Custodian. The GRC states that the evidence of record in the instant complaint indicates that the Custodian initially responded in writing to the Complainant on September 26, 2008 advising that HR was in possession of the requested divisional organization charts and that the Complainant had already submitted an OPRA request to HR.

The GRC states that the evidence of record further indicates that the Custodian provided the Complainant with two (2) organizational charts in response to the Complainant's October 30, 2008 supplemental request on October 20, 2008. The GRC states that the Custodian subsequently certified in the SOI that the two (2) charts provided had a records retention schedule of one (1) year. The GRC requests that the Custodian certify to the following:

1. At the time of the Complainant's September 10, 2008 OPRA request, whether your Division maintained the two (2) charts provided on October 20, 2008 in response to the Complainant's September 30, 2008 supplemental request?
2. Whether you had to obtain said charts from HR in order to provide said records to the Complainant?

The GRC requests that the Custodian provide the requested legal certification by October 6, 2009.

October 5, 2009

Custodian's legal certification. The Custodian certifies that upon receipt of the Complainant's OPRA request, he forwarded said request to the head of the LIHEAP program and Mr. Osworth for an appropriate response. The Custodian certifies that he was informed at the time that the official divisional organizational charts were with HR. The Custodian certifies he then contacted HR to confirm that said charts were maintained at HR and that they would provide the charts as part of HR's response to the Complainant. The Custodian certifies that, in his written response to the Complainant dated September 26, 2008, he advised the Complainant that HR would provide the requested charts as part of their response to the Complainant.

The Custodian certifies that, based on the understanding that the Complainant was later advised that the charts were created at the Division level and then forwarded to HR, the Complainant submitted a supplemental request for the charts on September 30, 2008. The Custodian certifies that after discussing the matter again with HR, it was clarified that the requested charts were, in fact, created at the Division level and confirmed that the "official" charts were held at the Department level. The Custodian certifies that he

obtained copies of the unofficial charts from Division staff and provided said charts to the Complainant on October 20, 2008.

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 Complainant’s initial request dated September 10, 2008 is a valid request under OPRA.

The Complainant’s initial request for “[i]nspection of all information, including e-mails, investigative findings, and meeting minutes, related to the transfer of the Administration of the [LIHEAP] and [USF] programs from the [DHS] to the [DCA] in December 2006 ...” (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) identifies several categories of records with a subject, yet fails to identify specific government records within an specified time period.

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),⁹ 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.”¹⁰

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

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

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 sought 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 request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) sought “[i]nspection of all information, including e-mails, investigative findings, and meeting minutes, related to the transfer of the Administration of the [LIHEAP] and [USF] programs from the [DHS] to the [DCA] in December 2006” As in Feiler-Jampel, *supra*, the Complainant’s request in this complaint is a blanket request for a class of various documents over an unspecified time period rather than a request for specifically named or identifiable government records.

Therefore, because the Complainant’s request in this complaint is a blanket request for a class of various documents over an unspecified time period rather than a request for specifically named or identifiable government records, the Complainant’s request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is 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).

The GRC next turns to the issue of whether the Custodian responded untimely and insufficiently to the Complainant's supplemental OPRA request dated September 30, 2008.

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.¹¹ 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 (Interim Order October 31, 2007).

Additionally, 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 ... 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, the Custodian responded in writing to the Complainant's supplemental OPRA request on the thirteenth (13th) business day following receipt of such providing access to two (2) organizational charts and advising the Complainant that he would inquire further about the MOU between the BPU and DCA and accompanying budget for 2006, 2007 and 2008. However, 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 supplemental OPRA request.

¹¹ 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.

Therefore, the Custodian's failure to respond in writing to the Complainant's September 30, 2008 supplemental OPRA request (for organizational charts, the MOU between DCA and accompanying budget for 2006, 2007 and 2008) either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days and insufficient response (to the MOU and budgets for 2007 and 2008) under OPRA because such did not grant access, deny access, seek clarification, or request an extension of time 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., Kelley, *supra*, and Bart, *supra*.

The GRC finally turns to the issue of whether the Custodian unlawfully denied access to records responsive to the Complainant's initial OPRA request for divisional organizational charts and supplemental OPRA request for organizational charts, the MOU and accompanying budgets.

Initial and Supplemental OPRA Request for Organization Charts

The Custodian certified both in the SOI and subsequently on October 5, 2009 that he responded on September 26, 2008 to the Complainant's request for divisional organizational charts for the period December 2006 to December 2008 stating that the requested charts were maintained by HR and that HR would provide access to the requested charts as part of their response to the Complainant. The Custodian certified that his response was based on confirmation from HR that the records were maintained by HR and they would provide the records to the Complainant.

However, the Custodian certified that the Complainant submitted a supplemental request for the charts after she was advised that the charts were created at the Division level and then forwarded to HR. The Custodian certified that he again contacted HR in order to clarify that the charts were, in fact, created at the Division level and confirmed that the "official" charts were held by HR. The Custodian certified that he obtained copies of the unofficial organization charts from Division staff and provided said charts to the Complainant on October 20, 2008.

The GRC has previously adjudicated complaints in which the Custodian initially denied access to records that were later located. In May v. Township of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007), the Complainant sought access to schematic floor plans of Edison High School. The Custodian initially denied the Complainant access to the requested floor plans by stating that the Complainant must submit his request to the Board of Education. After the Complainant filed his Denial of Access Complaint, the Custodian made the requested records available to the Complainant and indicated that she misunderstood the Complainant's request to be for Board of Education records. The Council held that:

“[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian has violated OPRA by denying the Complainant access to the requested records. Therefore, the Custodian unlawfully denied access to the requested floor plans and has failed to bear her burden

of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.”

Additionally, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian initially denied access to the requested records on the basis that no records responsive existed. However, in the SOI, the Custodian stated that he initially searched the Department’s files based on his understanding of what was being requested. The Custodian further stated that he conducted a second search of the Department’s records following receipt of the Complainant’s Denial of Access Complaint and located records responsive. The Council held that:

“[b]ecause the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a Job Analysis Questionnaire is a New Jersey Department of Personnel record, and that a proper search yielded other records responsive to the Complainant’s August 30, 2007 request, the Custodian unlawfully denied access to the requested records in his September 10, 2007 response to the Complainant’s OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6.”

This complaint is distinguishable from May, *supra*, because the Custodian in May summarily denied the Complainant’s request without conducting a search for said records. In the matter before the Council, the Custodian contacted HR to confirm that the requested charts were held by HR and would be provided to the Complainant as part of HR’s response.

Additionally, this complaint is distinguishable from Schneble, *supra*. In Schneble, the Custodian admitted to performing an inadequate search for the requested records based on his misinterpretation of the request. In the matter herein, the Custodian certified that he was not aware that the requested records were created at the Division level until he confirmed this fact with HR following the Complainant’s supplemental request.

Therefore, because the Custodian conducted a reasonable search for the requested divisional organizational charts, and because the Custodian certified that HR initially confirmed that the requested charts were maintained by HR and would be provided to the Complainant as part of their response, the Custodian did not unlawfully deny access to said charts and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.

Supplemental OPRA Request for the MOU and accompanying budgets

The Complainant asserts in her Denial of Access Complaint that the Custodian failed to provide access to any MOUs between the BPU and DCA for the budget years 2006, 2007 and 2008. However, the Custodian certified in the SOI that he provided access to the MOU between BPU and DCA dated December 2006, SFY 2007 Budget

submitted to BPU, Order approving SFY 2007 Budget dated July 11, 2007 and SFY 2008 Budget submitted to BPU on October 23, 2008 and certified that he did not provide a response stating that no 2006 budget existed because the Complainant did not request such in her September 30, 2008 supplemental request. The Custodian further certified that he provided access to all records responsive that were in possession of the DCR to the Complainant.

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 provided access to records on September 30, 2008, organizational charts on October 20, 2008 and the MOU and 2007 and 2008 budgets on October 23, 2008. The Custodian subsequently certified in the SOI that all records responsive to the Complainant's request had been provided and there is no credible evidence in the record to refute the Custodians' certification. Therefore, the Custodian did not unlawfully deny access to any records responsive pursuant to Burns, *supra*.

Whether the Custodian's untimely, insufficient response of the Complainant's supplemental 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 supplemental OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial, and although the Custodian provided an untimely and insufficient response to the Complainant’s supplemental request, because the Custodian certified that he provided all records responsive to the Complainant’s supplemental OPRA request, the Custodian conducted a reasonable search for the divisional organizational charts and because the Complainant’s initial OPRA request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is invalid, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s request in this complaint is a blanket request for a class of various documents over an unspecified time period rather than a request for specifically named or identifiable government records, the Complainant’s request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is 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, 37 (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).

2. The Custodian's failure to respond in writing to the Complainant's September 30, 2008 supplemental OPRA request (for organizational charts, the memorandum of Understanding between the New Jersey Department of Community Affairs and accompanying budget for 2006, 2007 and 2008) either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days and insufficient response (to the Memorandum of Understanding and budgets for 2007 and 2008) under OPRA because such did not grant access, deny access, seek clarification, or request an extension of time 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).
3. Because the Custodian conducted a reasonable search for the requested divisional organizational charts and because the Custodian certified that the New Jersey Department of Community Affairs, Human Resources Office initially confirmed that the requested charts would be provided to the Complainant as part of their response, the Custodian did not unlawfully deny access to said charts and has borne his burden of proving his due diligence in searching for said records pursuant to N.J.S.A. 47:1A-6.
4. The Custodian provided access to records on September 30, 2008, organizational charts on October 20, 2008 and the Memorandum of Understanding and 2007 and 2008 budgets on October 23, 2008. The Custodian subsequently certified in the Statement of Information that all records responsive to the Complainant's request had been provided and there is no credible evidence in the record to refute the Custodians' certification. Therefore, the Custodian did not unlawfully deny access to any records responsive pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
5. Although the Custodian's failure to provide a written response to the Complainant's supplemental OPRA request within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, and although the Custodian provided an untimely and insufficient response to the Complainant's supplemental request, because the Custodian certified that he provided all records responsive to the Complainant's supplemental OPRA request, the Custodian conducted a reasonable search for the divisional organizational charts and because the Complainant's initial OPRA request (with the exception of the request for divisional organizational charts for the periods covering December 2006 to December 2008) is invalid, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
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Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012¹²

¹² This complaint was prepared for adjudication on November 11, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.
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