



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Eric Taylor
Complainant

Complaint No. 2008-258

v.

Cherry Hill Board of Education (Camden)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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 regarding the requested meeting minutes either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days and failure to respond within the extended twenty-one (21) day time frame regarding the other requested records 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). *See also* Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame or within the extended response time frame, the Custodian did respond to the Complainant on December 31, 2008, stating that no receipts, invoices or contracts responsive had been located, and subsequently certified in the Statement of Information that no receipts, invoices, contracts or meeting minutes from 1975 to the present exist which are responsive to the request relevant to this complaint 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 requested receipts, invoices and meeting minutes from 1975 to present pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian has a duty to safeguard the integrity of government records and because the Custodian expressed the fragility of the meeting minutes as an issue at the



time of his response to the Complainant, providing inspection is a reasonable alternative to compromising the integrity of fragile records and the Custodian's offer of inspection of the meeting minutes from 1925 to 1975 is lawful pursuant to Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007).

4. Although the Complainant identified types of records in his OPRA request items No. 3 and No. 4, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's requests are invalid under OPRA 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, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
5. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to respond to the OPRA request on the expiration of the extension of time, because the Custodian responded in writing on December 31, 2008 stating that no records responsive exist, subsequently certified in the Statement of Information that no records responsive exist and lawfully provided the opportunity for inspection of the meeting minutes from 1925 to 1975 due to the fragility of the records and the Custodian's desire to safeguard the records, 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.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. This complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian lawfully provided inspection of the requested meeting minutes from 1925 to 1975 and certified in the Statement of Information that no receipts, invoices, contracts or meeting minutes from 1975 to the present which are responsive to the Complainant's OPRA request exist. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA and subsequent Statement of Information certification.

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 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Eric Taylor¹
Complainant**

GRC Complaint No. 2008-258

v.

**Cherry Hill Board of Education (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. All receipts regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
2. All receipts regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
3. All Board of Education meeting minutes regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
4. All Board of Education meeting minutes regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
5. All invoices regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
6. All invoices regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.
7. All contracts regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from January 11, 1968 to the present.
8. All contracts regarding any purchases of “Organic Law” books by the Cherry Hill Board of Education that were made to fulfill the requirements of N.J.S.A. 18A:36-18 from 1925 to January 10, 1968.³

¹ Represented by Kevin Mitchell, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Ariel Peikes, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler LLC (Morristown, NJ).

³ N.J.S.A. 18A:36-18 provides that: “[t]he board of education of every school district shall have printed and suitably bound in book form, copies of the Declaration of Independence, the constitution of the United States and the amendments thereto, and the constitution of the state of New Jersey and the amendments thereto, and a copy of such book shall be presented to each pupil upon his graduation from any elementary school.”

Request Made: September 17, 2008
Response Made: October 8, 2008
Custodian: James Devereaux
GRC Complaint Filed: November 21, 2008⁴

Background

September 17, 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.

October 8, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twelfth (12th) business day following receipt of such request.⁵ The Custodian states that based on the nature of the request, the Custodian requests a twenty-one (21) day extension of time to respond to the Complainant's request.

Further, the Custodian states that the Board's minutes from 1925 through the present are available for review. The Custodian states that the books containing the minutes are extremely fragile and cannot be photocopied.⁶

The Custodian states that he will contact the Complainant once the Board has determined whether any records responsive to the Complainant's request exist. The Custodian states that the most recent invoices and contracts, if any exist that are responsive to the Complainant's request, will be made available as soon as possible.

November 21, 2008

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

- Complainant's OPRA request dated September 17, 2008.
- Letter from the Custodian to the Complainant dated October 8, 2008.

The Complainant states that he mailed an OPRA request via certified mail to the Custodian on September 17, 2008. The Complainant states that the Custodian responded in writing on October 8, 2008 requesting an additional twenty-one (21) days to respond to the Complainant's request. The Complainant states that twenty-one (21) days has passed without a response from the Custodian.⁷

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

⁵ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on September 22, 2008.

⁶ The Custodian states that the Complainant can contact his assistant to schedule a time to come in and review the meeting minutes.

⁷ The Custodian's deadline to respond to the Complainant in writing granting access, denying access, seeking clarification or requesting a second extension of time to respond was on October 29, 2008.

The Complainant seeks the following:

1. That the GRC find that the Custodian's failure to respond is a deemed denial pursuant to N.J.S.A. 47:1A-5.i.
2. That the GRC order the Custodian to provide the requested records in the medium requested or submit a certification stating that no records responsive exist.
3. Attorney's fees as provided by N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

December 17, 2008

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

December 29, 2008

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that he was unable to obtain the Custodian's signature for the SOI prior to the Board closing until after the new year. The Custodian's Counsel states that he will obtain the Custodian's signature and provide the SOI as soon as possible.

December 30, 2008

E-mail from the GRC to the Custodian. The GRC grants an extension until January 7, 2009 to submit the SOI.

December 31, 2008

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel states that based on the Board's search for the records requested in the Complainant's OPRA request, the Board has concluded that no receipts, invoices or contracts relating to the purchase of Organic Law books exist. The Custodian's Counsel states that the Board has concluded that it has not made purchases of Organic Law books since 1975 or earlier than 1975.

January 7, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 17, 2008.
- Letter from the Custodian to the Complainant dated October 8, 2008.

The Custodian certifies that his search for the requested records involved speaking with employees that have served with the Cherry Hill school district for multiple decades who confirmed that, to the best of their knowledge, the Board has never made purchases or entered into any contracts for the purchase of Organic Law books. The Custodian states that he also searched the Board's storage area to locate any records responsive and confirmed that no records responsive existed in the storage area.

The Custodian certifies that records prior to 1975 were destroyed in accordance with the Board's retention schedule. The Custodian also certifies that the last date upon which records from 1975 to present that may have been responsive to the request were

destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) was on July 8, 1993.

The Custodian certifies that he received the Complainant’s OPRA request on September 22, 2008. The Custodian states that he responded on October 8, 2008, requesting an additional twenty-one (21) days to respond and providing access to inspect meeting minutes from 1925 to the present date. The Custodian states that he advised the Complainant that the books containing the minutes were fragile and could not be safely photocopied.

Additionally, the Custodian certifies that after an extensive search, the Board has determined that no receipts, invoices or contracts relating to the purchase of Organic Law books exist. The Custodian further certifies that the meeting minutes from at least 1975 to the present do not include any reference to the purchasing of Organic Law books.

January 15, 2008

The Complainant’s response to the Custodian’s SOI. The Complainant asserts that on October 8, 2008, the Custodian requested an additional twenty-one (21) days to respond, yet failed to state that no records responsive to the Complainant’s OPRA request exist until December 31, 2008. The Complainant asserts that the Custodian clearly violated N.J.S.A. 47:1A-5.i. and that the GRC should reject the Custodian’s assertion that he remained compliant with OPRA in responding to the Complainant’s request.

Additionally, the Complainant requests that the GRC reject any assertion from the Custodian that providing the requested meeting minutes for a general inspection is in any way responsive to the Complainant’s request, which was for copies of meeting minutes regarding any purchases of Organic Law books. The Complainant argues that providing the meeting minutes for inspection is an invitation for the Complainant to search through records, essentially performing the Custodian’s duties. The Complainant argues that the Custodian’s invitation to come and review records is not authorized by OPRA.

January 21, 2008

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel requests to submit a response to the Complainant’s January 15, 2008 letter to the GRC.

January 22, 2008

E-mail from the GRC to the Custodian’s Counsel. The GRC advises that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly afford a response to the SOI and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence relevant to the matter subject to adjudication.

January 23, 2009

Letter from the Custodian’s Counsel to the GRC. The Custodian’s Counsel contends that the Complainant’s request for meeting minutes is voluminous and would

impose a significant burden upon the Board. The Custodian's Counsel argues that aside from the thirty-three (33) years of meeting minutes that the Board already knows contain no references to Organic Law books, the Custodian would have to review thousands of pages of meeting minutes to locate and provide any records responsive that may or may not exist.

The Custodian's Counsel argues that the Complainant's request for meeting minutes from 1925 to the present referencing any purchase of Organic Law books is not a valid OPRA request pursuant to OPRA. The Custodian's Counsel contends that OPRA "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.'" MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

The Custodian's Counsel argues that the Custodian gave the Complainant the option of reviewing the requested meeting minutes in lieu of having to impose a special service charge in excess of several thousand dollars to provide records or deny access to the request as a substantial disruption of agency operations pursuant to N.J.S.A. 47:1A-5.g. The Custodian's Counsel contends that, rather than the Complainant having to incur the significant cost of copying in labor, reviewing the records as opposed to obtaining copies at a cost was the more reasonable option for the Complainant. The Custodian's Counsel contends that the Custodian's invitation to review the meeting minutes responsive to the Complainant's request was appropriate.⁸

Analysis

Whether the Custodian failed to respond to the Complainant's September 17, 2008 OPRA request in a timely manner?

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.

⁸ The Custodian's Counsel notes that the Complainant failed to contact the Custodian's assistant to schedule a date to review the records.
Eric Taylor v. Cherry Hill Board of Education (Camden), 2008-258 – Findings and Recommendations of the Executive Director

OPRA also states that:

“[i]mmediate access ordinarily shall be granted to budgets, *bills*, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

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

OPRA further provides that:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a

“deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In this matter currently before the Council, the Custodian failed to respond in writing to the Complainant’s OPRA request until the twelfth (12th) business day after receipt of the Complainant’s request seeking an extension of time and providing access to inspect the Board’s meeting minutes from 1925 to the present. The Custodian further failed to respond within the requested twenty-one (21) day extension of time.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request regarding the requested meeting minutes either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days and failure to respond within the extended twenty-one (21) day time frame regarding the other requested records 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. See also Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

However, 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 or within the extended response time frame, the Custodian did respond to the Complainant on December 31, 2008, stating that no receipts, invoices or contracts responsive had been located, and subsequently certified in the SOI that no receipts, invoices, contracts or meeting minutes from 1975 to the present exist which are responsive to the request relevant to this complaint 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 requested receipts, invoices and meeting minutes from 1975 to present pursuant to Pusterhofer, supra.

Moreover, the Complainant contends that the Custodian’s invitation to inspect the Board’s meeting minutes from 1925 to 1975 unreasonably places the duty to search

through the minutes to find those requested records responsive on the Complainant. The Custodian, in his response to the Complainant's OPRA request, expressed concern about the fragility of the meeting minutes and their inability to withstand the copying process.

In Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007), the Complainant requested to use a personal copier to avoid incurring copying costs. The GRC held that:

“where a custodian *believes* that the *safety, integrity* or confidentiality of a document requested pursuant to OPRA *may be compromised...* a custodian may, *consistent with OPRA, refuse to permit* the use of a personal photocopier by a requestor.” [Emphasis added].

The Custodian's concern for the records in this complaint is similar to that of the Custodian's concern in Hascup, supra. In his October 8, 2008 written response to the Complainant, the Custodian raised concerns about safeguarding the Board's meeting minutes because of their fragility. The Custodian's duty to safeguard the integrity of Board's meeting minutes from copying because of their fragility is a reasonable concern.

Therefore, because the Custodian has a duty to safeguard the integrity of government records and because the Custodian expressed the fragility of the meeting minutes as an issue at the time of his response to the Complainant, providing inspection is a reasonable alternative to compromising the integrity of fragile records and the Custodian's offer of inspection of the meeting minutes from 1925 to 1975 is lawful pursuant to Hascup, supra.

Additionally, the receipts, invoices and contracts requested are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. However, N.J.S.A. 47:1A-5.e states that such access “ordinarily shall be granted.” In the instant complaint, the Complainant's OPRA request was so voluminous in nature that it required the Custodian to spend some time reviewing records before he could determine that no records responsive exist. Therefore, the Custodian has not violated N.J.S.A. 47:1A-5.e.

Moreover, the Complainant's OPRA request items No. 3 and No. 4 identify types of records (meeting minutes); however, said requests fail to specify the dates of particular minutes and therefore require the Custodian to research which minutes contain references to the purchase of “Organic Law” books by the Cherry Hill Board of Education.

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 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...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2008), 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 Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’¹¹ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’^{12,}”

Therefore, although the Complainant identified specific types of records in his OPRA request items No. 3 and No. 4, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to

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

¹⁰ As stated in Bent, *supra*.

¹¹ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹² “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Eric Taylor v. Cherry Hill Board of Education (Camden), 2008-258 – Findings and Recommendations of the Executive Director

a request pursuant to Donato, supra. As such, the Complainant's requests are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Whether the Custodian's deemed denial of access 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 days resulted in a "deemed" denial and the Custodian failed to respond to the OPRA request upon the expiration of the extension of time, because the Custodian responded in writing on December 31, 2008 stating that no records responsive exist, subsequently certified in the SOI that no records responsive exist and lawfully provided the opportunity for inspection of the meeting minutes from 1925 to 1975 due to the fragility of the records and the Custodian's desire to safeguard the records, 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 Eric Taylor v. Cherry Hill Board of Education (Camden), 2008-258 – Findings and Recommendations of the Executive Director 10

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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a

plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The court in Mason, supra, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

In the matter before the Council, the Complainant requested that the GRC find that the Custodian’s failure to respond in writing within seven (7) business days results in a deemed denial and that the GRC order the Custodian to provide the requested records in the medium requested. While the GRC finds that the Custodian’s failure to respond within the statutorily mandated time frame results in a deemed denial, the GRC does not order the Custodian to provide the requested records because no records responsive exist with regards to the receipts, invoices and contracts requested, the meeting minutes from 1925 to 1975 are too fragile for copying and request items No. 3 and No. 4 are invalid because the request items fail to specify the dates of particular meeting minutes sought, therefore requiring the Custodian to research his records to find responsive records.

Additionally, the Custodian certified in the SOI that no receipts, invoices, contracts or meeting minutes from 1975 to the present which are responsive exist and his response that the meeting minutes from 1925 to 1975 are available for inspection due to the fragility of the records is a lawful response.

Therefore, pursuant to Teeters, supra and Mason, supra, the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees. This complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Specifically, the Custodian lawfully provided inspection of the requested meeting minutes from 1925 to 1975 and certified in the SOI that no receipts, invoices, contracts or meeting minutes from 1975 to the present which are responsive to the Complainant’s OPRA request exist. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant’s Denial of Access Complaint and the Custodian’s technical violation of OPRA and subsequent SOI certification.

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 regarding the requested meeting minutes either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days and failure to respond within the extended twenty-one (21) day time frame regarding the other requested records 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). *See also* Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

2. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame or within the extended response time frame, the Custodian did respond to the Complainant on December 31, 2008, stating that no receipts, invoices or contracts responsive had been located, and subsequently certified in the Statement of Information that no receipts, invoices, contracts or meeting minutes from 1975 to the present exist which are responsive to the request relevant to this complaint 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 requested receipts, invoices and meeting minutes from 1975 to present pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Custodian has a duty to safeguard the integrity of government records and because the Custodian expressed the fragility of the meeting minutes as an issue at the time of his response to the Complainant, providing inspection is a reasonable alternative to compromising the integrity of fragile records and the Custodian's offer of inspection of the meeting minutes from 1925 to 1975 is lawful pursuant to Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007).
4. Although the Complainant identified types of records in his OPRA request items No. 3 and No. 4, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's requests are invalid under OPRA 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, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
5. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to respond to the OPRA request on the expiration of the extension of time, because the Custodian responded in writing on December 31, 2008 stating that no records responsive exist, subsequently certified in the Statement of

Information that no records responsive exist and lawfully provided the opportunity for inspection of the meeting minutes from 1925 to 1975 due to the fragility of the records and the Custodian's desire to safeguard the records, 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.

6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. This complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Specifically, the Custodian lawfully provided inspection of the requested meeting minutes from 1925 to 1975 and certified in the Statement of Information that no receipts, invoices, contracts or meeting minutes from 1975 to the present which are responsive to the Complainant's OPRA request exist. Additionally, using the catalyst theory, there is no factual causal nexus between the filing of the Complainant's Denial of Access Complaint and the Custodian's technical violation of OPRA and subsequent Statement of Information certification.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009