



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

December 18, 2008 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2008-41

v.

County of Union
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant's requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Because the Complainant's 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), it is concluded that neither the Custodian's nor the Custodian Counsel's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



3. The Complainant is not a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6, 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).

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 December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

Tina Renna¹
(on behalf of Union County Watchdog Association)
Complainant

GRC Complaint No. 2008-41

v.

County of Union²
Custodian of Records

Records Relevant to Complaint:

1. Inspection of file(s), in whole or in part, concerning the 2007 Musicfest Walk/Rock on! Walkathon
2. Identify the employee(s) in charge of coordinating the Musicfest Walk/Rock on! Walkathon and produce the file(s) maintained or created by said employee(s)
3. Identify all employees involved with the Musicfest Walk/Rock on! Walkathon
4. All e-mails between Union County employees that contain any of the following words: “walkathon;” “musicfest” or “Love Hope Strength” from January 1, 2007 to date
5. Any agreement, memorandum or report that mentions Love Hope Strength Foundation
6. Any record that shows money given to the Love Hope Strength Foundation

Request Made: December 31, 2007

Response Made: January 10, 2008

Custodian: Nicole DiRado

GRC Complaint Filed: March 4, 2008³

Background

December 31, 2007

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.

January 10, 2008

County of Union’s response to the OPRA request. Marlena M. Russo, Information Assistant, responds in writing to the Complainant’s OPRA request on the

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Alexandra DeFresco, Esq., of the County of Union Office of the County Counsel.

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

seventh (7th) business day following receipt of such request. The Information Assistant's responses to the Complainant's enumerated requests are as follows:

1. Request is denied because it is overbroad and unclear. The request fails to specifically identify a government record within the meaning of OPRA or include a specific time frame.
2. Request is denied because it fails to specifically identify a government record. The request seeks information.
3. Request is denied because it fails to specifically identify a government record. The request seeks information.
4. Request is overbroad and unclear and would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g. because the County would have to search through any and all employees' e-mail for three (3) words. Clarification is needed to identify a specific government record.
5. Request is denied because it is overbroad and unclear. The request fails to specifically identify a government record within the meaning of OPRA and requires the Custodian to search every agreement, memorandum or record ever produced. This request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.
6. Request is denied because it is overbroad and unclear. The request fails to specifically identify a government record within the meaning of OPRA and requires the Custodian to conduct research. This request would substantially disrupt agency operations pursuant to N.J.S.A. 47:1A-5.g.

January 17, 2008

Letter from Complainant's Counsel to Custodian. Counsel asserts that the County's response to the Complainant's OPRA request seems to discourage the Complainant from continuing to pursue the records requested. Counsel states that the time frame for item #1 is the 2007 Musicfest/Walkathon. Counsel states that regarding item #2, the Custodian should inquire which employees had responsibilities relating to the 2007 Musicfest Walk/Rock on! Walkathon and ask said employees for the related files. Regarding items #4-6, Counsel states that the County denied access pursuant to N.J.S.A. 47:1A-5.g. Counsel states that said provision permits a custodian to deny access to a request that would substantially disrupt the operations of the agency only "after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 181 (App.Div. 2007). Counsel states that the County has made no attempt to reach a reasonable solution regarding these requests. Counsel suggests in response to item #4 the County conduct an electronic search of its e-mail for the search terms provided or identify the individuals involved with the Musicfest Walk/Rock on! Walkathon and conduct a search of their e-mails. Counsel suggests that regarding item #5 the County should identify the files that contain any agreements, memoranda or reports regarding Love Hope Strength Foundation. Regarding item #6 Counsel suggests that the County search its check ledger, receipts ledger or other general ledger documents for responsive records.

January 30, 2008

Letter from Custodian's Counsel to Complainant's Counsel. The Custodian's Counsel states that the County denied access to items #1-2 of the Complainant's OPRA request (which requested that the County identify the employees involved with the 2007 Musicfest Walk/Rock on! Walkathon) because the Complainant failed to identify a specific government record. Counsel states that the GRC has previously found that a request to "identify" is an improper request for information and not a request for a specific government record. Counsel cites Della Vella v. City of Wildwood (Cape May), GRC Complaint No. 2007-51 (November 2007) and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007).

Counsel states that the Complainant's Counsel recommended several times in his letter dated January 17, 2008 that the County identify the potential records that are responsive to the Complainant's request or to identify individuals involved with the Musicfest Walk/Rock on! Walkathon. The Custodian's Counsel states that 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, and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). Counsel states that 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." Id. at 549.

Additionally, Counsel states that in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), the Superior Court referenced MAG when the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." The court held that "[a]s 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." Counsel states that requests using the words "any and all" have been deemed by the County as broad or unclear because they fail to identify a specific government record. Counsel contends that the Complainant's requests for entire files fails to amount to an identifiable government record.

Counsel also states that the Complainant failed to identify a time frame for items #5-6 of the request. Counsel contends that said requests are so open-ended that the County would be forced to manually sift through every record in order to locate any records responsive. Additionally, Counsel states that the County does not have the means to search its entire e-mail system for specific search terms.

Further, Counsel contends that the requests were denied or clarification was sought because the Complainant's requests were broad or unclear and failed to specify an identifiable government record. Counsel asserts that although N.J.S.A. 47:1A-5.g. was not the basis for the denial of access, the County cited the statute because any attempt to fulfill the requests would substantially disrupt agency operations.

March 4, 2008

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

- Complainant’s OPRA request dated December 31, 2007
- Information Assistant’s response to the OPRA request dated January 10, 2008
- Letter from Complainant’s Counsel to Custodian dated January 17, 2008
- Letter from Custodian’s Counsel to Complainant’s Counsel dated January 30, 2008⁴

The Complainant states that the County of Union refused to produce records responsive to her OPRA request. The Complainant states that the County denied access to her request in its entirety and contends that the County is using its size as a barrier to access because it claims that the records could be located anywhere.

The Complainant states that the County denied access to item #1 of her request on the basis that the request was vague, overbroad or unclear because it fails to specifically identify a government record and because it lacks a time frame. The Complainant states that the County denied access to item #2 on the basis that the request failed to identify a government record. The Complainant states that item #3, while not strictly an OPRA request, was made to assist both the Complainant and the Custodian with identifying employees who maintained any records responsive. The Complainant states that the County denied access to item #4 on the basis that the request was overly broad and would substantially disrupt agency operations. The Complainant states that the County denied access to items #5-6 on the basis that the requests were overly broad, lacked a time frame and would substantially disrupt agency operations.

Additionally, the Complainant states that her Counsel attempted to resolve this matter without litigation and suggested ways in which the County could locate the requested records via letter dated January 17, 2008. The Complainant states that Counsel also asserted that the County violated OPRA by claiming that the Complainant’s request would substantially disrupt agency operations without attempting to reach a reasonable solution that accommodates both the agency and the requestor. The Complainant states that the Custodian’s Counsel responded via letter dated January 30, 2008 in which Counsel reasserted the County’s denials, failed to reach a reasonable accommodation, claimed that requests for entire files are improper under OPRA and claimed that N.J.S.A. 47:1A-5.g. was not the basis of the denial of access.

Further, the Complainant attaches various records that indicate that the County is connected to the Love Hope Strength Foundation and contends that because of this relationship, the requested records should be located with ease.

The Complainant requests the following relief from the Council:

1. A finding that the Custodian violated OPRA and unlawfully denied access to items #1,2,4,5 and 6 of the Complainant’s request.

⁴The Complainant includes additional records which are not relevant to the adjudication of this complaint.
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2. An order compelling the Custodian to produce the records responsive to the request.
3. An award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.
4. Upon investigation, imposition of a fine against the Custodian and the Custodian's Counsel for knowingly and willfully violating OPRA. (The Complainant includes the Custodian's Counsel here because of her claim that N.J.S.A. 47:1A-5.g. was not the basis for the denial when the Complainant asserts it obviously was).

The Complainant did not agree to mediate this complaint.

March 17, 2008

Request for the Statement of Information sent to the Custodian.

March 25, 2008

Custodian's Statement of Information ("SOI") with the following attachments:⁵

- Complainant's OPRA request dated December 31, 2007
- Information Assistant's response to the request dated January 10, 2008
- Letter from Complainant's Counsel to Custodian dated January 17, 2008
- Letter from Custodian's Counsel to Complainant's Counsel dated January 30, 2008

The Custodian's Counsel states that the County received the Complainant's OPRA request on December 31, 2007 which included six (6) enumerated requests. Counsel states that the County provided the Complainant with a written response dated January 10, 2008 in which the County indicated that the Complainant's request did not specifically identify government records. Counsel states that on January 27, 2008 the County received a letter from the Complainant's Counsel which did not provide clarification of the Complainant's requests but rather demanded that the County provide the requested records and provided instructions on how and why the County should research and identify the records requested. The Custodian's Counsel states that she responded to the Complainant's Counsel via letter dated January 30, 2008 and cited the applicable GRC decisions and case law regarding the Complainant's broad or unclear requests.

Counsel asserts that this complaint is frivolous because the County properly responded to the Complainant's OPRA request. Counsel also asserts that the Complainant included several irrelevant exhibits in her Denial of Access Complaint in an attempt to justify her argument that the County is responsible for researching and identifying the requested records. Counsel contends that the exhibits only prove that the Musicfest/Rock on! Walkathon was County sponsored. Counsel asserts that any County employee could have created a file or record relating to said event (all County employees were informed of the event and provided the opportunity to attend). As such, Counsel contends that short of the Complainant identifying a specific government record, the County is not obligated to perform research in response to the request. Further, Counsel asserts that because the Complainant is in possession of records pertaining to the

⁵The Custodian's Counsel signed the Statement of Information.
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Musicfest/Rock on! Walkathon, which she included in her Denial of Access Complaint, she has the ability to request specific identifiable government records pertaining to said event.⁶

Additionally, Counsel states that the court in New Jersey Builders Association v. New Jersey Council on Affordable Housing, App. Div. (January 24, 2007)⁷ held that “when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA.” Id. at 15. Counsel also cites MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) in that OPRA “is not intended as a research tool litigants may use to identify and siphon useful information.” Counsel also states that in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (October 2005)⁸ the court referenced MAG in holding that a requestor must specifically describe the record sought because OPRA operates to make identifiable government records accessible. Counsel states that the court noted that a proper request under OPRA must identify with reasonable clarity the records desired and that a party cannot satisfy this request by requesting all of an agency’s documents. Counsel asserts that this is what the Complainant did in item #1 of her request when she requested entire files. Counsel contends that an entire file does not constitute an identifiable government record within the meaning of OPRA. Counsel asserts that the County would have to search every employee’s files for a potentially responsive record.

Counsel also contends that requests to “identify,” as requested in item #2 of the Complainant’s request, are improper requests under OPRA. Counsel asserts that item #2 is a request for information and not a request for a government record. *See* Della Vella v. City of Wildwood (Cape May), GRC Complaint No. 2007-51 (November 2007) and Shain v. Ocean County Board of Taxation, GRC Complaint No. 2007-127 (November 2007). Counsel asserts that the same applies to item #3 of the Complainant’s request.

As for item #4 of the Complainant’s request, Counsel states that the County denied access on the basis that the request was broad or unclear and requested clarification. Counsel states that the Complainant did not provide any such clarification. Instead, Counsel states that the Complainant’s Counsel directed the County on how it should fulfill this request. The Custodian’s Counsel asserts that to fulfill this request, the County would have to manually sift through every e-mail sent, received or forwarded from every County employee. Counsel contends that this search would be overly burdensome to the County and would substantially disrupt agency operations. Additionally, Counsel states that the County does not have the technological capability to perform a search of the entire e-mail system for specific search terms.

Further, Counsel asserts that items #5-6 of the Complainant’s request seek “any and all” records and are broad and unclear pursuant to NJ Builders, *supra*, MAG, *supra*, and Bent, *supra*.

⁶ The Complainant included additional records with her Denial of Access Complaint which are not relevant to the adjudication of this complaint.

⁷ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 181 (App. Div.2007).

⁸ Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Counsel contends that a search for the requested records would have substantially disrupted agency operations because the Complainant's OPRA requests are broad and unclear, do not identify a specific government record and the Complainant failed to clarify her requests. Counsel states that to the best of her knowledge, no records responsive have been destroyed.

June 5, 2008

The Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel states that the Custodian did not sign the SOI as is required by the GRC. Additionally, Counsel states that the Custodian's SOI fails to indicate what search the County undertook to locate the records responsive to the Complainant's request. Counsel states that the County instead indicated that any search would substantially disrupt agency operations. However, Counsel asserts that N.J.S.A. 47:1A-5.g. permits a custodian to deny a request when it would substantially disrupt agency operations only "after attempting to reach a reasonable solution with the requestor that accommodates the interest of the requestor and the agency." See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 181 (App. Div.2007). Counsel states that the County made no effort to reach a reasonable solution in this matter. Further, Counsel asserts that the County's substantial disruption allegation is unsupported by facts. Counsel questions how agency operations would be disrupted, what personnel would be required and how long fulfilling the request would take.

Additionally, Counsel contends that the Complainant's requests for subject matter files were sufficiently specific. Counsel states that the Council held in Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (April 2008) that while a custodian is not required to conduct research in response to a request, a custodian is obligated to search his/her files for responsive records.

June 17, 2008

Letter from Custodian's Counsel to the GRC. Counsel states that the County will provide the SOI under the Custodian's signature if the GRC so requires. Regarding the Complainant Counsel's reference to Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (April 2008), the Custodian's Counsel asserts that the facts of said complaint can be differentiated from this instant matter. Specifically, Counsel states that the Complainant in Paff sought access to resolutions and executive session minutes relating to specific dates and meetings. Counsel states that in this instant complaint, the Complainant failed to identify any specific government records. Counsel also restates facts and assertions previously submitted to the GRC.

June 19, 2008

Letter from GRC to Custodian's Counsel. The GRC requests that the Custodian sign the SOI, as is required.

June 20, 2008

Custodian's signed SOI.

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 states 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.” (Emphasis added). N.J.S.A. 47:1A-5.g.

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

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

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

The Custodian in this complaint certifies that she received the Complainant’s OPRA request on December 31, 2008. The Custodian states that the Information Assistant provided a written response to the Complainant’s request on January 10, 2008, the seventh (7th) business day following receipt of said request. The Information Assistant denied access to items # 1-3 of the Complainant’s request on the basis that the Complainant failed to identify a specific government record within the meaning of OPRA. The Information Assistant sought clarification of item # 4 of the request and stated that the request was overbroad and unclear and would substantially disrupt agency

operations pursuant to N.J.S.A. 47:1A-5.g. The Information Assistant denied access to items # 5-6 on the basis that the Custodian would be required to conduct research and fulfilling the requests would substantially disrupt agency operations.

OPRA requests for information, requests that fail to identify specific government records and requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA. Specifically, 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..." 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."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG 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)."

Using the above cases as guidance concerning the specificity required for OPRA requests, the Complainant's requests at issue here fit into the category of broad or unclear requests. Specifically, in item #1 of the request the Complainant seeks access to files

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

¹⁰ As stated in Bent, *supra*.

concerning the 2007 Musicfest Walk/Rock on! Walkathon. The Custodian contends that an entire file is not a government record under OPRA and that in order to satisfy this request the Custodian would have to research every County employee's files for any potential responsive records. A "file" may or may not be considered a specifically identifiable government record depending on the circumstances. For example, a request for the GRC's file regarding this complaint would be a specific request because the requested file is a collection of papers regarding this complaint that are kept together in one location and can be easily accessed. However, the circumstances surrounding the request at issue in this complaint are distinguishable. The Custodian certifies that any County employee may maintain a file regarding the Musicfest Walk/Rock on! Walkathon and as such the requested file cannot be specifically identified based on the request as currently worded. In this particular instance, no specific, identifiable files are requested and as such, the request for files is broad and unclear.

Item #2 of the Complainant's request asked the Custodian to identify the employees who were involved with the Musicfest Walk/Rock on! Walkathon and to provide copies of said employees' files. The Custodian's Counsel asserts that requests to "identify" are not valid requests under OPRA and that this particular request is a request for information. As stated in MAG, *supra*, OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." The Custodian in this matter is not required to identify which employees were involved with the Musicfest Walk/Rock on! Walkathon. As such, item #2 of the Complainant's request is not a request for specific, identifiable government records and as such, is broad and unclear.

Item #4 of the Complainant's request sought all e-mails between County employees from January 1, 2007 to the date of the request that contained specific terms. The County requested clarification by stating that the request was broad or unclear and did not specify an identifiable government record pursuant to OPRA. The Complainant Counsel's response to the County's request for clarification included directions on how to search for the requested records but said response did not narrow down the request. This item does seek a specific type of record (e-mail) within a specific time frame (January 1, 2007 to date of request) containing specific terms ("walkathon;" "musicfest" or "Love Hope Strength"). However, said request does not specifically identify the parties of said e-mails. The Complainant seeks access to all County employees' e-mails. The Custodian certifies that the County does not have the technological capability to conduct a County wide search for specific terms.

In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005) the Custodian sought clarification of the Complainant's broad or unclear request and did not receive a response from the Complainant. The Council held that "[i]n the case of the records that needed clarification, there was no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant."

Similar to the facts in Cody, the Custodian in this instant matter sought clarification of the Complainant's broad or unclear request. Although the Complainant's Counsel responded to the clarification request, he failed to actually clarify the Complainant's request. As such, pursuant to Cody, the Custodian did not unlawfully deny access to item #4 of the Complainant's request.

Regarding item #5 of the Complainant's request, the County denied access on the basis that the Complainant fails to identify a specific government record. As stated in Bent, supra, "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." The Complainant does request specific types of records (agreements, memoranda and reports). However, the request requires the Custodian to research each and every agreement, memorandum and report in the County's possession for any records that mention the Love Hope Strength Foundation. As stated in MAG, supra, OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." As such, the Complainant's request is broad and unclear.

Finally, as for item #6, the Custodian denied access on the basis that the Complainant failed to identify a specific government record. The Complainant's Counsel, in his letter to the Custodian dated January 17, 2008, clarified this request to include check ledgers, receipt ledgers or general ledger documents. However, both the Complainant and the Complainant's Counsel failed to provide a specific time frame for said request. Additionally, the request required the Custodian to research every entry in every ledger in the County's possession for any ledgers that mention the Love Hope Strength Foundation. As stated in MAG, supra, OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." As such, the Complainant's request is broad and unclear.

However, the Complainant's Counsel contends that pursuant to Paff v. Borough of Roselle, GRC Complaint No. 2007-255 (April 2008), a custodian is required to search her files to locate records responsive even though a custodian is not obligated to conduct research in response to an OPRA request. The distinction between searching for specific identifiable government records and researching a broad and unclear request was discussed in Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). Specifically, the Council held 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

In this instant complaint, because the Complainant’s requests are broad and unclear as they are requests for information and/or do not specifically identify a government record, to fulfill said request the Custodian would have to conduct research which she is not obligated to do.

Therefore, because the Complainant’s requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra* and Donato, *supra*.

Additionally, because the Complainant’s requests are invalid, the GRC declines to consider the issue of whether said requests would have substantially disrupted agency operations.

Whether the Custodian’s and/or the Custodian Counsel’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

The Custodian certifies that she received the Complainant’s OPRA request on December 31, 2007. The Custodian states that the Information Assistant responded in writing on January 10, 2008, in which the Information Assistant denied access to said requests on the basis that said requests were broad or unclear.

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

¹² “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006 .

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)).

Because the Complainant's requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra*, and Donato, *supra*, it is concluded that neither the Custodian's nor the Custodian Counsel's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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. Stat. Ann. § 47:1A-6 and N.J. Stat. Ann. § 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 Complainant’s Denial of Access Complaint, the Complaint sought a finding that the Custodian unlawfully denied access to the requested records and an order compelling the Custodian to produce said records. As stated above, the Complainant’s requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra*, and Donato, *supra*. Additionally, neither the Custodian nor the Custodian’s Counsel knowingly and willfully violated OPRA. Therefore, the Complainant is not a prevailing party entitled to an award of reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to a request, 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

2. Because the Complainant's 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), it is concluded that neither the Custodian's nor the Custodian Counsel's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant is not a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6, 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).

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Executive Director

December 10, 2008