



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

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Stephen Jung
Complainant

Complaint No. 2008-52

v.

Borough of Roselle (Union)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or 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). Moreover, OPRA provides that “the requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” N.J.S.A. 47:1A-5.i. Consequently, the Custodian’s failure to respond by March 10, 2008, as stated in the Custodian’s February 29, 2008 letter to the Complainant, also results in a “deemed” denial.
2. Because the Custodian failed to grant immediate access to the Complainant’s request for budget material, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because Request Item Nos. 3-5, 8 and 9 fail to specify identifiable government records and Request Item Nos. 2-5, 8 and 9 would require the Custodian to conduct research, Request Item Nos. 2-5, 8 and 9 are invalid pursuant to MAG Entertainment LLC. V. Div. 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), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public



Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to Request Item Nos. 2-5, 8 and 9.

4. Because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days and further failed to grant or deny access on the date established as the extended response date, and also failed to grant immediate access to the requested budget material, 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 because the Custodian provided the Complainant with the requested records that were under her direct control approximately thirteen (13) business days following the date of the Complainant's request and made repeated attempts to procure the remaining records despite the invalid nature of the request items. However, the Custodian's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stephen Jung¹
Complainant**

GRC Complaint No. 2008-52

v.

**Borough of Roselle (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Detailed copies of the fiscal year 2007 and 2008 municipal budgets;
2. All purchase orders, payment vouchers, and copies of cancelled checks that correspond to payments made under Mayor Garrett Smith and Council administrative budget line from January 1, 2007 to February 11, 2008;
3. All financial records related to the cost of cell phones, Blackberries or any electronic equipment that was given to the Mayor and Council from January 1, 2006 to the present;
4. All records that document who received electronic equipment listed in Request Item No. 3;
5. All documents pertaining to all financial grants that were awarded to or received by the Borough of Roselle (“Borough”) via the CDGB (Block Grants) from January 1, 2007 to the present;
6. New Jersey State required financial disclosure statements for Mayor Garrett Smith, Councilpersons Sylvia Turnage and Sally Samuel for 2007 and 2008;
7. New Jersey State required financial disclosure for Councilperson Samantha Dow for 2008;
8. All financial records pertaining to costs for Mayor Smith and council members to attend meetings, trainings and all other events and trips from January 1, 2007 to February 11, 2008;
9. All records of attendance for Mayor Smith and council members at events from January 1, 2007 to February 11, 2008;

Request Made: February 11, 2008

Response Made: February 29, 2008

Custodian: Rhona Bluestein

GRC Complaint Filed: March 19, 2008³

¹ No legal representation listed on record.

² Represented by Wilfredo Benitez, Esq., of The Law Office of Wilfredo Benitez (Montclair, NJ).

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

Background

February 11, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on three (3) official OPRA request forms.

February 20, 2008

Internal memorandum from the Custodian to the Finance Department. The Custodian forwards a copy of the Complainant's OPRA request to the Finance Department. The Custodian states that all records that are responsive to the request are to be forwarded to the Custodian by February 22, 2008. The Custodian further states that if the records are not available, the Department Head must provide a signed written statement stating why the records cannot be provided by February 22, 2008.

February 25, 2008

Internal memorandum from the Custodian to the Finance Department. The Custodian forwards a copy of the Complainant's OPRA request to the Finance Department. The Custodian states that all records that are responsive to the request are to be forwarded to the Custodian by February 29, 2008. The Custodian further states that if the records are not available, the Department Head must provide a signed written statement stating why the records cannot be provided by February 29, 2008.

February 29, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the thirteenth (13th) business day following receipt of such request. The Custodian states that access to the 2007 financial disclosure statements for Mayor Smith and Councilpersons Turnage and Samuel (Request Item No. 6) are available for on-site inspection at the Borough Clerk's Office. The Custodian also states that 2008 financial disclosure statements for Mayor Smith and Councilpersons Turnage, Samuel, and Dow (Request Item No. 7) do not exist. The Custodian further states that the Complainant inspected the detailed fiscal year 2008 municipal budget on February 26, 2008.

The Custodian states that the remaining items on the Complainant's OPRA request were forwarded to the Finance Department for further processing. The Custodian also states that as of the date of this letter, the Finance Department has not provided the Custodian with the status on the availability of the records requested. The Custodian states that she will continue to try to locate and respond to the remaining items on the Complainant's OPRA request. The Custodian states that, due to a shortage of staff and ongoing heavy workload requirements, fulfilling the Complainant's OPRA request may substantially disrupt the agency's operations. The Custodian requests additional time to respond to the Complainant's remaining items. The Custodian states that she will contact the Complainant by March 10, 2008 about the availability of the remaining records.

March 19, 2008

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

- Complainant's OPRA request dated February 11, 2008;
- Letter from the Custodian to the Complainant dated February 29, 2008.

The Complainant states that he submitted an OPRA request on February 11, 2008. The Complainant further states that the only response he received from the Custodian was the February 29, 2009 letter.

March 31, 2008

Offer of Mediation sent to both parties.

March 31, 2008

E-mail from the Administrative Clerk, Marilyn Ford to Adrian Mapp, the Chief Financial Officer. Ms. Ford states that the Finance Department response is seriously over due on the Complainant's OPRA request. Ms. Ford requests that Mr. Mapp provide Ms. Ford with an estimated date of availability for the records requested.

April 1, 2008

The Custodian agreed to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

April 11, 2008

Request for the Statement of Information sent to the Custodian.

April 17, 2008

Interoffice Memorandum from the Chief Financial Officer to the Custodian. Mr. Mapp states that the Finance Department is providing the Custodian with all the information that is currently available. Mr. Mapp addresses each item of the Complainant's OPRA request as follows:

1. The record is in the possession of the Custodian.
2. The Finance Department has attached the requested information.
3. The Finance Department does not keep records on any equipment provided to elected officials. This record does not exist.
4. The Finance Department does not keep the record requested.
5. No CDGB grants have been awarded to the Borough from January 1, 2007 to present. The record does not exist.
6. The record is in the possession of the Custodian.
7. The record is in the possession of the Custodian.
8. This request is too vague; a specific record must be requested. Mr. Mapp suggests that the Complainant refer to the records provided in Request Item No. 2.
9. This request is too vague; a specific record must be requested. Mr. Mapp suggests that the Complainant refer to the records provided in Request Item No. 2.

April 18, 2008

Letter from the Custodian to the GRC. The Custodian states that she has received the request for the Statement of Information. The Custodian states that due to an extremely heavy workload during the past two (2) months, reductions in staff, and the Custodian's attendance at an education conference, the Custodian requests an extension of the deadline for filing the Statement of Information until April 28, 2008.

April 22, 2008

E-mail from the GRC to the Custodian. The GRC grants the requested extension of time and confirms that the new deadline for filing the Statement of Information is April 28, 2008.

May 2, 2008

Letter from the Custodian to the GRC. The Custodian states that her office computer is not functioning. The Custodian also states that she will be out of the office on May 2, 2008 and May 5, 2008 to attend to personal matters. The Custodian requests an additional extension of the filing deadline for the Statement of Information until May 8, 2008. The Custodian states that the municipality does not employ a full time computer service or Information Technology technician but rather contracts with an outside vendor that has no specific time requirements for completing repairs. The Custodian also states that she is composing this letter from her home computer.

May 6, 2008

E-mail from the GRC to the Complainant. The GRC forwards the Custodian's May 2, 2008 letter to the Complainant.

May 6, 2008

Letter from the GRC to the Custodian. The GRC confirms the extension of the Statement of Information deadline until May 8, 2008. The GRC states that this is the final extension that will be granted to complete the Statement of Information.

May 8, 2008⁴

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

- Complainant's OPRA request dated February 11, 2008;
- Internal memorandum from the Custodian to the Finance Department dated February 20, 2008;
- Internal memorandum from the Custodian to the Finance Department dated February 25, 2008;
- Letter from the Custodian to the Complainant dated February 29, 2008;
- E-mail from the Custodian to the Finance Department dated March 31, 2008;
- Interoffice memorandum from the Finance Department to the Custodian dated April 17, 2008.

⁴ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

The Custodian certifies that she received the Complainant's OPRA request on February 12, 2008. The Custodian also certifies that she responded verbally to the OPRA request on February 22, 2008. The Custodian certifies that she informed the Complainant that a copy of the detailed fiscal year 2008 municipal budget and copies of the 2007 financial disclosure statements were available. The Custodian further certifies that she informed the Complainant that the Custodian does not have direct access to certain financial records requested by the Complainant. The Custodian also certifies that the Complainant inspected the fiscal year 2008 municipal budget on February 26, 2008. The Custodian further certifies that she sent the Complainant a letter on February 29, 2008 to document the records that were already provided and the status of the remaining request items. The Custodian also certifies that the Custodian made available 2007 financial disclosure statements for the three (3) elected officials listed in the Complainant's OPRA request. The Custodian certifies that the Complainant chose not to inspect these records.

The Custodian certifies that 2008 financial disclosure statements for the four (4) elected officials listed in the Complainant's OPRA request do not exist. The Custodian states that due to the inexperience of the staff in the Municipal Clerk's Office, no one had the training or knowledge to grant the Complainant immediate access to the budget materials requested. The Custodian certifies that she sent an interoffice memorandum dated February 20, 2008 to the Chief Financial Officer, Mr. Mapp which requested the financial records not in the possession of the Custodian. The Custodian also certifies that when she failed to receive a response from the Chief Financial Officer, she sent another interoffice memorandum dated February 25, 2008. The Custodian certifies that on March 31, 2008, she directed her new Administrative Clerk, Marilyn Ford, to send another request to the Chief Financial Officer. The Custodian certifies that in an interoffice memorandum dated April 17, 2008, the Chief Financial Officer provided records responsive to Request Item No. 2, indicated that no records responsive to Request Items Nos. 3-5 exist and concluded that Request Items Nos. 8 and 9 were broad and unclear.

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]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 provides that:

“A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA also states 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 to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived ... *The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added). N.J.S.A. 47:1A-5.i.

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

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

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

The Custodian responded in writing to the Complainant’s OPRA request on the thirteenth (13th) business day after receipt of same. The Custodian granted access to the 2007 financial disclosure statements for Mayor Smith and Councilpersons Turnage and Samuel (Request Item No. 6). The Custodian stated that 2008 financial disclosure statements for Mayor Smith and Councilpersons Turnage, Samuel, and Dow (Request Item No. 7) did not exist. The Custodian further stated that the Complainant inspected the detailed municipal budget for fiscal year 2008 on February 26, 2008. The Custodian

stated that she would contact the Complainant by March 10, 2008 about the availability of the remaining records. However, the Custodian failed to respond by the specified date.

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.⁵ 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).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Moreover, OPRA provides that "the requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied." N.J.S.A. 47:1A-5.i. Consequently, the Custodian's failure to respond by March 10, 2008, as stated in the Custodian's February 29, 2008 letter to the Complainant, also results in a deemed denial.

Furthermore, the Custodian's failure to grant immediate access to the Complainant's request for copies of the 2007 and 2008 fiscal year budgets is a violation of N.J.S.A. 47:1A-5.e. The Complainant submitted his request for copies of the 2007 and 2008 fiscal year budgets on February 11, 2008. The Custodian did not grant the Complainant access to the budget materials until February 29, 2008. The Custodian stated in the SOI that due to the inexperience of the staff in the Municipal Clerk's Office, no one had the training or knowledge to grant the Complainant immediate access to the budget materials requested. Nevertheless, OPRA provides that immediate access shall ordinarily be granted to requests for budgets. N.J.S.A. 47:1A-5.e.

Because the Custodian failed to grant immediate access to the Complainant's request for budget materials, the Custodian has violated N.J.S.A. 47:1A-5.e.

Although the Custodian failed to respond within seven (7) business days of receipt of the Complainant OPRA request, and failed to provide an immediate response to the request for budget materials, Request Items Nos. 2 – 5, 8 and 9 of the Complainant's OPRA request are invalid. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise

⁵ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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),⁶ 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."⁷

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 *N.J. Super.* 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted *N.J.S.A. 47:1A-5.g.* in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 were 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)."

Moreover, in Bart v. Passaic County Public Housing Agency, Docket No. 406 *N.J. Super.* 445 (App. Div. 2009), the court stated that:

"The Act [OPRA] does not, however, require custodians of government records to undertake research for a requestor. The requestor must identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency's files and "analyze, compile and collate" the requested information." (citing MAG Entertainment, LLC v. Division of Alcoholic

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)).

Additionally, in James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the GRC held that:

“Pursuant 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. The word *research*, on the other hand, means “a close and careful study to find new facts or information.” (Emphasis added.)

Request Item Nos. 2-5, 8 and 9 amount to broad-sweeping requests for any and every Borough financial record for a two (2) year period. Request Item Nos. 3-5, 8 and 9 fail to specify an identifiable government record but rather identify a subject matter sought by the Complainant. The Custodian would have to review every record in the agency’s possession to determine if the record contained the specified subject matter. While Request Item No. 2 identified a type of record, it too requires the Custodian to conduct research to ascertain what payments Mayor Garrett and the Council made from January 1, 2007 to February 11, 2008 before the Custodian could attempt to fulfill the request.

OPRA does not require custodians to conduct research to satisfy an OPRA request. MAG, *supra*. OPRA only requires a custodian to search for an identifiable government record. Donato, *supra*. OPRA requires a custodian to make available only identifiable governments records. Bent, *supra*. It is the requestor’s obligation to identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency’s files. Bart, *supra*. Although the Custodian provided some records responsive to Request Item Nos. 2-5, 8 and 9, these request items are still invalid.

Because Request Item Nos. 3-5, 8 and 9 fail to specify identifiable government records and Request Item Nos. 2-5, 8 and 9 would require the Custodian to conduct research, Request Item Nos. 2-5, 8 and 9 are invalid pursuant to MAG Entertainment LLC. V. Div. 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), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to Request Item Nos. 2-5, 8 and 9.

Furthermore, the Custodian has not unlawfully denied the Complainant access to Request Item Nos. 6-7. 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 the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

The Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business day and further failed to grant or deny access on

the date established as the extended response date. The Custodian also failed to grant immediate access to the Complainant's request for copies of the 2007 and 2008 fiscal year budgets. However, the Custodian provided access to the records that were under her direct control. The Custodian also made repeated attempts to procure the remaining records from the Finance Office.

Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days and further failed to grant or deny access on the date established as the extended response date, and also failed to grant immediate access to the requested budget material, 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 because the Custodian provided the Complainant with the requested records that were under her direct control approximately thirteen (13) business days following the date of the Complainant's request and made repeated attempts to procure the remaining records despite the invalid nature of the request items. However, the Custodian's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or 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). Moreover, OPRA provides that "the requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied." N.J.S.A. 47:1A-5.i. Consequently, the Custodian's failure to respond by March 10, 2008, as stated in the Custodian's February 29, 2008 letter to the Complainant, also results in a "deemed" denial.
2. Because the Custodian failed to grant immediate access to the Complainant's request for budget material, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Because Request Item Nos. 3-5, 8 and 9 fail to specify identifiable government records and Request Item Nos. 2-5, 8 and 9 would require the Custodian to conduct research, Request Item Nos. 2-5, 8 and 9 are invalid pursuant to MAG Entertainment LLC. V. Div. 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), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v.

Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to Request Item Nos. 2-5, 8 and 9.

4. Because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days and further failed to grant or deny access on the date established as the extended response date, and also failed to grant immediate access to the requested budget material, 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 because the Custodian provided the Complainant with the requested records that were under her direct control approximately thirteen (13) business days following the date of the Complainant's request and made repeated attempts to procure the remaining records despite the invalid nature of the request items. However, the Custodian's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009