



**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**

**September 30, 2009 Government Records Council Meeting**

Bernard Neugebauer and Joseph Muzio  
Complainant

Complaint No. 2008-69

v.

Borough of Leonia (Bergen)  
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. Acting Custodian Jack Terhune’s failure to respond in writing to the Complainants’ 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 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).
2. Because every item listed in the Complainants’ request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although Acting Custodian Jack Terhune’s failure to provide a written response to the Complainants’ OPRA request within the statutorily mandated seven (7) business day period resulted in a “deemed” denial, because the



Acting Custodian did respond to the Complainant in writing on the tenth (10<sup>th</sup>) business day following the date of the Complainant's request, it is concluded that the Acting 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, Acting Custodian Jack Terhune's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> 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**

**Bernard Neugebauer and Joseph Muzio<sup>1</sup>  
Complainants**

**GRC Complaint No. 2008-69**

v.

**Borough of Leonia (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Who is specifically responsible for managing fuel for the Borough? What are the current procedures to purchase and deliver or distribute fuel for the Borough of Leonia? Who does the purchasing and who officially signs off on the delivery receipts?
2. What individuals are authorized to dispense the fuel? Is it one individual or a list of specific employees? Is there a control form identifying the individual and/or list of employees? Are there specific controls regarding who has the key to open and close the gasoline pump and availability of fuel?
3. Are daily “stick” measurements of the Borough’s fuel tanks, including long-accepted industry methods to test for water in the tanks carried out?
4. To have a clear understanding of fuel usage in Borough vehicles, we are requesting a list of all such vehicles and the following information: How many miles has each vehicle been driven in the past three years? If applicable, how much idling time has each vehicle accrued in the past three years? How much fuel was used by each vehicle in the last three years? What were the total gallons of fuel for each of the last three years?
5. Does the Borough have a stated policy informing drivers of Borough vehicles to turn them off when not in actual use?
6. How is it determined what grade of gasoline will be purchased? Is there a need for any grade other than “regular?” Is diesel fuel used?
7. Can the Borough reduce the number of vehicles that burn a high volume of gasoline?
8. Does the Borough have a stated policy limiting use of Borough vehicles outside the municipality except when on official business? What is the monthly gas consumption for the Police Chief’s vehicle?
9. What criteria are used to determine vehicle replacement and the selection of vehicle type?
10. Is there a preventive maintenance program for borough vehicles?
11. Have we ever had any fluid leakage from the municipal gasoline storage tank? If so, what corrective actions were taken? Were the corrective actions effective?

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Brian T. Giblin, Esq., of Giblin & Giblin (Oradell, NJ).

12. Does the Borough maintain vehicle accident report records? How are accidents handled? Are there patterns to the accidents, and if so what action is taken to prevent future accidents?
13. Does the Borough Auditor carry out procedures to determine irregularities and to ensure compliance with borough procedures?

**Request Made:** February 21, 2008<sup>3</sup>

**Response Made:** March 6, 2008

**Custodian:** Frances Lehmann, Borough Clerk

**GRC Complaint Filed:** April 3, 2008<sup>4</sup>

### **Background**

#### **February 21, 2008**

Complainants' Open Public Records Act ("OPRA") request. The Complainants request the records listed above on an official OPRA request form.

#### **March 6, 2008**

E-mail from the Complainants to the Acting Custodian, Borough Administrator Jack Terhune. The Complainants state that they submitted a public records request and inform the Acting Custodian that the seven (7) business day period provided for the Custodian's response has expired. The Complainants state that they never received a response from the Acting Custodian.

#### **March 6, 2008**

Acting Custodian's response to the OPRA request. The Acting Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request.<sup>5</sup> The Acting Custodian informs the Complainants that the Custodian is on medical leave; however, the Acting Custodian acknowledges that he has a copy of the Complainants' request and will obtain copies of the available records, to include a request for proposals, correspondence from the Business Administrator to the Leonia Board of Education ("BOE") and the BOE's response to the Business Administrator.

#### **March 18, 2008**

E-mail from the Complainants to the Acting Custodian. The Complainants express their concerns about the management of vehicle fuel by the Borough and summarize the Acting Custodian's lack of progress on their records request.

---

<sup>3</sup> The OPRA request was not dated. The Complainants in their Denial of Access Complaint state that the request was made on approximately February 22, 2008; however, the Custodian informed the GRC that she clearly remembers the date of request as February 21, 2008 because it was her last day at work before taking medical leave.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian turned the Complainant's request over to Borough Administrator Jack Terhune because the Custodian was commencing a two (2) week medical leave effective February 22, 2008. Mr. Terhune agreed to serve as Acting Custodian for this matter until the Custodian returned to work.

**April 3, 2008**

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

- Letter from the Complainants, along with twelve (12) other Leonia residents, to the Leonia Mayor and Council Members dated June 22, 2006<sup>6</sup>
- Letter from the Complainants, along with twelve (12) other Leonia residents, to the Leonia Mayor and Council Members dated October 3, 2006
- E-mail from the Complainants to the Acting Custodian dated March 6, 2008
- Acting Custodian’s response to the OPRA request dated March 6, 2008
- E-mail from the Complainants to the Acting Custodian dated March 18, 2008

The Complainants state that on or about February 22, 2008 they filed a “Request for Public Records” by delivering it to the Borough Clerk. Upon not receiving a response in seven (7) business days, the Complainants state that they sent an e-mail to the Acting Custodian dated March 6, 2008. The Complainants acknowledge that the Acting Custodian sent them a reply e-mail responding to the OPRA request later that same date, but the Complainants assert that the Acting Custodian did not answer the questions they presented. The Complainants state that they sent a follow-up e-mail to the Acting Custodian dated March 18, 2008 but never received a reply.

On the Records Denied List, the Complainants list the attachments to their Denial of Access Complaint rather than the description of the records to which they were denied access. The Complainants state that they did not include a copy of their records request with the Denial of Access Complaint.

The Complainants request that the GRC inform them why questions presented to the Borough for almost two (2) years have gone unanswered.

The Complainants agreed to mediate this complaint.

**April 7, 2008**

Offer of Mediation sent to the Acting Custodian.

**April 9, 2008**

The Custodian agrees to mediate this complaint.

**April 15, 2008**

The complaint is referred for mediation.

**January 13, 2009**

The complaint is referred back from mediation to the GRC for adjudication.

---

<sup>6</sup> This letter was in the form of a petition seeking information relative to management of vehicle fuel by the Borough.  
Bernard Neugebauer and Joseph Muzio v. Borough of Leonia, 2008-69 – Findings and Recommendations of the Executive Director

**January 15, 2009**

E-mail from the GRC to the Complainants. The GRC informs the Complainants that the required copy of the official OPRA request form was not attached to their Denial of Access Complaint. The GRC advises the Complainants to forward to the GRC a copy of the OPRA request dated on or about February 22, 2008.

**January 16, 2009**

E-mail from the Complainants to the GRC. The Complainants inform the GRC that they do not understand what the GRC means by an official OPRA request form.

**January 16, 2009**

E-mail from the GRC to the Complainants. The GRC directs the Complainants to read Advisory Opinion 2006-71 which is posted on the GRC's website. The GRC further advises the Complainants that if they still do not understand what an official OPRA request form is after reading Advisory Opinion 2006-71, they should contact the GRC.

**January 16, 2009**

Request for the Statement of Information sent to the Custodian.

**January 20, 2009**

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that he is in receipt of the Statement of Information form. Counsel informs the GRC that the Complainants had for some time been asking Borough officials for information regarding gasoline usage. Counsel states that the Borough has no records to provide the Complainants regarding this matter.

The GRC advises Counsel that the GRC never received a copy of an OPRA request with the Denial of Access Complaint, but has requested one from the Complainants. The GRC further advises Counsel that if the GRC receives a copy of the OPRA request, the GRC will forward a copy to the Borough. Counsel states he will promptly submit the completed Statement of Information to the GRC.

**January 21, 2009**

Telephone call from Complainant Muzio to the GRC. The Complainant states he is searching for a copy of the official OPRA request form as well as a response from the Custodian's Counsel and needs some additional time to locate the documents. The GRC grants a five (5) business day extension of time for the Complainant to locate and submit to the GRC the documents which will supplement his Denial of Access Complaint.

**January 21, 2009**

E-mail from the GRC to the Complainant. The GRC confirms its telephone conversation with Complainant Muzio granting an extension of time for the Complainant to submit supplemental documentation to the GRC.

**January 23, 2009**

Custodian's Statement of Information ("SOI") attaching the Complainants' undated OPRA request. The Custodian certifies that she received the Complainants'

OPRA request on or about February 22, 2008 and responded in writing to the Complainants' request on or about April 2, 2008.

The Custodian certifies that the search for the requested records involved attempting to glean the information sought by the Complainants from the questions posed by the Complainants in their correspondence dated June 22, 2006 and October 3, 2006, which was attached to the Complainants' OPRA request. The Custodian further certifies that the following correspondence consisting of three (3) records, although not requested by the Complainants, is determined to be related to the information that the Complainants' requested:

NUMBER	RECORD DESCRIPTION
1	Quote from Petro-Mechanics, Inc. for municipal fuel management system dated January 8, 2008.
2	Letter from Administrator Terhune to Superintendent of Schools, Bernard Josefsberg dated January 14, 2008.
3	Letter from Superintendent of Schools, Bernard Josefsberg, to Administrator Terhune, dated January 22, 2008.

The Custodian certifies that the above-described records must be retained for one (1) year in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian certifies that she disclosed copies of these records to the Complainants on April 2, 2008.

The Custodian emphasizes in her certification that, although the three (3) records disclosed to the Complainants were not specifically requested by them, the Custodian disclosed the records in the interest of providing the Complainants with information which bore some relationship to the information the Complainants sought. The Custodian certifies that the Complainants' OPRA request did not list any specific identifiable records, but rather was used as a cover sheet for two (2) earlier letters dated June 22, 2006 and October 3, 2006 which the Complainants had previously sent to the Borough of Leonia. Further, the Custodian certifies that the OPRA request did not seek any specific identifiable records. The Custodian certifies that the request seeks information in the form of responses to various questions about fuel consumption. The Custodian argues that no identifiable records are requested by the Complainants in their OPRA request. The Custodian argues that no government record as defined under N.J.S.A. 47:1A-1.1 is requested by the Complainants; therefore, the Complainants failed to make a valid OPRA request.

### **January 27, 2009**

Letter from the Complainants to the GRC. The Complainants respond to the GRC's correspondence dated January 15, 2009, wherein the GRC requested a copy of the official OPRA request that the Complainants failed to attach to their Denial of Access

Complaint.<sup>7</sup> Rather than providing the GRC with a copy of the OPRA request form for this complaint, the Complainants prepare another OPRA request dated January 27, 2009 for the records relevant to this request by using the GRC's model request form. The Complainants then provide the GRC with a copy of that request.

The Complainants also assert that the Custodian failed to lawfully disclose the requested records by relying upon documents between the parties which the Complainants attach to their letter. The attachments, however, were distributed by and between the parties during settlement negotiations during the mediation process.

#### **April 2, 2009<sup>8</sup>**

Letter from the Complainants to the GRC. The Complainants express their concern that the municipality has incurred additional expense for the taxpayers by retaining an attorney to assist the Custodian in the preparation of the SOI. The Complainants state it is inconceivable that the Custodian's Counsel answered ten (10) of their document requests by stating there were no records responsive to said requests. The Complainants restate their thirteen (13) requests and then ask several rhetorical questions regarding municipal operations. Finally, the Complainants express incredulity that there are no formal documents or stated processes that would have been responsive to their requests.

### **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 further provides that:

---

<sup>7</sup> The official OPRA request which formed the basis of this complaint had since been provided to the GRC as an attachment to the SOI.

<sup>8</sup> 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.

“[i]f the custodian is unable to comply with a request for access, *the custodian shall indicate the specific basis therefore 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA also 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 ...*” (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).

In the instant complaint, the Custodian stated that she very clearly remembered the date she received the Complainants’ OPRA request as February 21, 2008 because it was her last day at work before taking medical leave. Despite the Custodian’s averment that she provided a written response to the OPRA request on April 2, 2008, which would have been the twenty-seventh (27<sup>th</sup>) business day following receipt of such request, the evidence of record reveals that Acting Custodian Jack Terhune responded to the request by e-mail dated March 6, 2008, which is ten (10) business days following receipt of the

request. However, this date is still outside the statutorily mandated seven (7) business day period.

Accordingly, Acting Custodian Jack Terhune's failure to respond in writing to the Complainants' 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).

Notwithstanding the Custodian's "deemed" denial, the Custodian certified that on April 2, 2008, she disclosed to the Complainant a copy of three (3) records in the interest of providing the Complainants with information which bore some relationship to the information they sought. The Custodian, however, was under no legal obligation to disclose records to the Complainants because the Complainants had requested information and not records. Each of the Complainants' requests was not a request for a specific identifiable record, but rather it was a question seeking information concerning municipal operations.

OPRA requests that fail to identify specific government records 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),<sup>9</sup> 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."<sup>10</sup>

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

---

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

<sup>10</sup> As stated in Bent, *supra*.

would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

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

Therefore, because every item listed in the Complainants’ request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG, supra, Bent, supra, and New Jersey Builders Association, supra, and the Council’s decision in Schuler, supra.

**Whether Acting Custodian Jack Terhune’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 at 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 (App. Div. 1996) at 107).

Although Acting Custodian Jack Terhune's failure to provide a written response to the Complainants' OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Acting Custodian did respond to the Complainant in writing on the tenth (10<sup>th</sup>) business day following the date of the Complainants' request, it is concluded that the Acting 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, Acting Custodian Jack Terhune's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Acting Custodian Jack Terhune's failure to respond in writing to the Complainants' 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 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).
2. Because every item listed in the Complainants' request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although Acting Custodian Jack Terhune's failure to provide a written response to the Complainants' OPRA request within the statutorily mandated seven (7) business day period resulted in a "deemed" denial, because the Acting Custodian did respond to the Complainant in writing on the tenth (10<sup>th</sup>) business day following the date of the Complainant's request, it is concluded that the Acting 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, Acting Custodian Jack Terhune'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.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

September 23, 2009