



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

August 24, 2010 Government Records Council Meeting

Anthony Parisi
Complainant

Complaint No. 2009-112

v.

City of Gloucester City (Camden)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 2010 Supplemental 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. While no records have been provided by the Custodian to the Complainant, the Custodian Counsel’s timely response to the Council’s February 23, 2010 Interim Order indicates that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant’s move without providing a forwarding address to the Custodian or the GRC leaves the Custodian unable to actually provide the requested records to the Complainant. Thus, despite not actually providing the records to the Complainant as ordered by the Council in its February 23, 2010 Interim Order, the Custodian’s readiness and ability to provide the records to the Complainant as indicated in the Custodian Counsel’s March 4, 2010 certification amounts to a timely compliance with the Council’s Order.
2. Although the Custodian’s failure to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, and the Custodian failed to provide the Council with evidence in support of the originally assessed \$150.00 copy fee for a copy of the master plan of the City, and the Custodian failed to provide copies of the requested records of the city council meetings of August 2008, September 2008 and October 2008, the Custodian Counsel’s March 4, 2010 certification amounts to a timely compliance with the Council’s Order because in it the Custodian’s Counsel certifies that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant’s move without providing a forwarding address to the Custodian or the GRC leaves the



Custodian unable to actually provide the requested records to the Complainant. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Anthony Parisi¹
Complainant**

GRC Complaint No. 2009-112

v.

**City of Gloucester (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. Master plan for the City of Gloucester;
2. Name of the insurance company for Chatham Square Apartments;
3. Recording of the City of Gloucester Council meetings for August, September, and October; and
4. Meeting minutes for the Council meeting wherein the Council voted to purchase the Chatham Square Apartments (building purchased February 2008).

Request Made: September 2008 and October 2008³

Response Made: September 18, 2008, September 24, 2008, and September 30, 2008

Custodian: Paul Kain⁴

GRC Complaint Filed: April 2, 2009⁵

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 2010 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, found 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.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant did not provide the exact dates upon which he submitted his OPRA requests. The Complainant also failed to provide the GRC with copies of his requests. The Complainant indicated in the Denial of Access Complaint that his requests were ignored but he provides three (3) dates upon which he received responses to his requests.

⁴ The new (current) custodian is Kathleen M. Jentsch.

⁵ The GRC received the Denial of Access Complaint on said date.

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 the Custodian failed to provide the Council with evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of Gloucester is \$150.00, the City of Gloucester⁶ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee.
3. Because the Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008, and because the Custodian failed to provide to the Council any evidence that would require non-disclosure of such records, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.
- 4. The Custodian shall comply with items #2 and #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.⁸**
5. Because the Complainant's request Items No. 2 and 4 do not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request for Items No. 2 and 4 is invalid pursuant to MAG Entertainment LLC. V. Div. 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).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 1, 2010

Council's Interim Order distributed to the parties.

⁶ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

March 4, 2010

Custodian's response to the Council's Interim Order. The Solicitor responds on behalf of the Custodian and certifies that the master plan of the City consists of four-hundred and seven (407) pages and the copying fee is calculated pursuant to the statute at \$47.20. The Solicitor further certifies that this record is available online at no charge. The Solicitor also certifies that additional information from the Complainant is required to comply with the Council's Interim Order regarding the request for recordings of the August, September and October 2008 City Council meetings. The Solicitor certifies that Gloucester City has three meetings a month and all are tape recorded for assistance in preparation of the minutes. Additionally, the Solicitor certifies that one of those meetings each month is videotaped for later broadcast on the local public access channel. Therefore, the Solicitor certifies whichever "recordings" the Complainant wants will be supplied upon payment of the costs associated with the appropriate medium copying costs.

May 10, 2010

Letter from the GRC to the Complainant. The GRC informs the Complainant that pursuant to the Council's February 23, 2010 Interim Order, the Custodian's Counsel responded within the required five (5) business days by indicating that the master plan of the City consists of four-hundred and seven (407) pages and the copying fee is calculated pursuant to the statute at \$47.20, but is also available online for at no charge. Further, the GRC asks the Complainant whether he wants a copy of the master plan of the city for \$47.20.

Additionally, the GRC explains the various "recordings" available for the August, September and October 2008 Council meetings and asks the Complainant to clarify whether the Complainant wants all audio and video recordings for each of the three (3) meetings.

The GRC requests that the Complainant respond to this correspondence by Friday, May 14, 2010.

May 19, 2010

Return to Shipper Notification from UPS Overnight Mail Service to the GRC. The letter from the GRC to the Complainant dated May 10, 2010 was returned to the GRC with written notification from UPS indicating that the letter could not be delivered because the receiver (Anthony Parisi) has moved.

Analysis**Whether the Custodian complied with the Council's February 23, 2010 Interim Order?**

At its February 23, 2010 public meeting, the Council determined, among other things, that because the Custodian failed to provide the Council with evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of

Gloucester is \$150.00, the City of Gloucester⁹ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee. Additionally, the Council determined that because the Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008, and because the Custodian failed to provide to the Council any evidence that would require non-disclosure of such records, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.

The Council ordered the Custodian to comply with the Interim Order within five (5) business days from receipt of the Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)¹⁰ to the Executive Director. Such compliance was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on March 8, 2010.

The Custodian's Counsel provided the GRC with a legal certification stating that a copy of the master plan of the City consists of four-hundred and seven (407) pages and the copy cost is calculated pursuant to the statute at \$47.20, but is also available online at no charge on March 4, 2010. The Solicitor also certified that additional information from the Complainant is required to comply with the Council's Interim Order regarding the request for recordings of the August, September and October 2008 City Council meetings. The Solicitor certified that Gloucester City has three meetings a month and all are tape recorded for assistance in preparation of the minutes. Additionally, the Solicitor certified that one of those meetings each month is videotaped for later broadcast on the local public access channel. Therefore, the Solicitor certified whichever "recordings" the Complainant wants will be supplied upon payment of the costs associated with the appropriate medium copying costs.

While no records have been provided by the Custodian to the Complainant, the Custodian Counsel's timely response to the Council's February 23, 2010 Interim Order indicates that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant's move without providing a forwarding address to the Custodian or the GRC leaves the Custodian unable to actually provide the requested records to the Complainant. Thus, despite not actually providing the records to the Complainant as ordered by the Council in its February 23, 2010 Interim Order, the Custodian's readiness and ability to provide the records to the Complainant as indicated in the Custodian Counsel's March 4, 2010 certification amounts to a timely compliance with the Council's Order.

⁹ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Whether the Custodian’s unlawful denial of 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).

Although the Custodian’s failure to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, and the Custodian failed to provide the Council with evidence in support of the originally assessed \$150.00 copy fee for a copy of the master plan of the City, and the Custodian failed to provide copies of the requested records of the City Council meetings of August 2008, September 2008 and October 2008, the Custodian Counsel’s March 4, 2010 certification amounts to a timely compliance with the Council’s Order because in it the Custodian’s Counsel certifies that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant’s move without providing a forwarding address to the Custodian or the GRC leaves the Custodian unable to actually provide the requested records to the Complainant. Therefore, it is concluded that the Custodian’s actions do not rise to the

level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While no records have been provided by the Custodian to the Complainant, the Custodian Counsel's timely response to the Council's February 23, 2010 Interim Order indicates that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant's move without providing a forwarding address to the Custodian or the GRC leaves the Custodian unable to actually provide the requested records to the Complainant. Thus, despite not actually providing the records to the Complainant as ordered by the Council in its February 23, 2010 Interim Order, the Custodian's readiness and ability to provide the records to the Complainant as indicated in the Custodian Counsel's March 4, 2010 certification amounts to a timely compliance with the Council's Order.
2. Although the Custodian's failure to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian failed to provide the Council with evidence in support of the originally assessed \$150.00 copy fee for a copy of the master plan of the City, and the Custodian failed to provide copies of the requested records of the city council meetings of August 2008, September 2008 and October 2008, the Custodian Counsel's March 4, 2010 certification amounts to a timely compliance with the Council's Order because in it the Custodian's Counsel certifies that the Custodian is ready and able to provide the records to the Complainant as ordered by the Council. However, the Complainant's move without providing a forwarding address to the Custodian or the GRC leaves the Custodian unable to actually provide the requested records to the Complainant. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Anthony Parisi
Complainant

Complaint No. 2009-112

v.

City of Gloucester (Camden)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 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).
2. Because the Custodian failed to provide the Council with evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of Gloucester is \$150.00, the City of Gloucester¹ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee.
3. Because the Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008, and because the Custodian failed to provide to the Council any evidence that would require non-disclosure of such records, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist

¹ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.



or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.

4. **The Custodian shall comply with items #2 and #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², to the Executive Director.³**
5. Because the Complainant's request Items No. 2 and 4 do not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request for Items No. 2 and 4 is invalid pursuant to MAG Entertainment LLC. V. Div. 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).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council
Decision Distribution Date: March 1, 2010

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Anthony Parisi¹
Complainant**

GRC Complaint No. 2009-112

v.

**City of Gloucester (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. Master plan for the City of Gloucester;
2. Name of the insurance company for Chatham Square Apartments;
3. Recording of the City of Gloucester Council meetings for August, September, and October; and
4. Meeting minutes for the Council meeting wherein the Council voted to purchase the Chatham Square Apartments (building purchased February 2008).

Request Made: September 2008 and October 2008³

Response Made: September 18, 2008, September 24, 2008, and September 30, 2008

Custodian: Paul Kain

GRC Complaint Filed: April 2, 2009⁴

Background

September 2008

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

April 2, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with no attachments. The Complainant states that he is the President of the Chatham Square Apartments Association. The Complainant also states that the apartment complex is owed by the City of Gloucester. The Complainant indicates that he has made multiple OPRA requests which were ignored by the Custodian. However, the Complainant provides three (3) dates upon which he received responses to his requests (September 18, 2008, September 24, 2008, and September 30, 2008). The Complainant did not provide documentation supporting these responses from the Custodian.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant did not provide the exact dates upon which he submitted his OPRA requests. The Complainant also failed to provide the GRC with copies of his requests. The Complainant indicated in the Denial of Access Complaint that his requests were ignored but he provides three (3) dates upon which he received responses to his requests.

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

The Complainant further states that when the Custodian failed to respond to his multiple requests, he called the Custodian and was told that he could have a copy of the master plan upon payment of a copy fee of \$150.00. The Complainant objects to the proposed copying fee.

The Complainant agrees to mediate this complaint.

May 8, 2009

Offer of Mediation sent to both parties. The Custodian did not respond to the Offer of Mediation.

May 27, 2009

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

July 14, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 27, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

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 ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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. 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. A custodian must also 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.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).

In the instant matter, the Custodian failed to respond in writing to the Complainant’s OPRA request.

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).

The Complainant contends that when the Custodian failed to respond to his multiple requests, he called the Custodian and was told that he could have a copy of the master plan of the City of Gloucester City upon payment of a copy fee of \$150.00. The Complainant objects to the proposed copying fee.

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the

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.

duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

Additionally, in Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), the court addressed the issue of the cost of providing copies of requested records to a requestor. The plaintiffs argued that if custodians could set a per page copy fee, arguably custodians could set a rate that would deter the public from requesting records. The court stated that “[w]here the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.” *Id.* at 31.

Further, in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 (App. Div. 2005), the court cited Moore, *supra*, by stating that “[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor... Thus, the fees allowable under the common law doctrine are consistent with those allowable under OPRA.” 376 N.J. Super. at 279.

However, on May 28, 2009, the GRC requested that the Custodian provide a completed SOI within five (5) business days, to which the Custodian failed to respond. On July 14, 2009, the GRC requested that the Custodian provide a completed SOI within three (3) business days, and again the Custodian failed to respond.

Because the Custodian failed to provide to the Council evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of Gloucester is \$150.00, the City of Gloucester⁶ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee.

The Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008. The Custodian failed to provide to the Council any evidence that would require non-disclosure of such

⁶ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.

records. Therefore, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.

Request Item No. 2 of the Complainant's OPRA request sought the name of the insurance company for the Chatham Apartments. This is a request for information rather than an identifiable government record. Request Item No. 4 of the Complainant's OPRA request sought meeting minutes for the Council meeting wherein the Council voted to purchase the Chatham Square Apartments (building purchased February 2008). This request would require the Custodian to conduct research to identify records which may be responsive to the request.

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 (March 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 (October 2005)⁷, 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."⁸

Request Item No. 2 of the Complainant's OPRA request did not specify an identifiable government record but instead sought information. Request Item No. 4 of the Complainant's OPRA request would require the Custodian to conduct research and collate data according to the Complainant's specification. OPRA does not require custodians to conduct research to satisfy an OPRA request. MAG, *supra*. OPRA requires a custodian to make available identifiable governments records. Bent, *supra*.

Because Request Items No. 2 and 4 of the Complainant's OPRA request does not specify identifiable government records and would require the Custodian to conduct research, these request items are invalid under OPRA pursuant to MAG Entertainment LLC v. Div. 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).

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent.

Whether the Custodian's unlawful denial of 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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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).
2. Because the Custodian failed to provide the Council with evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of Gloucester is \$150.00, the City of Gloucester⁹ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee.
3. Because the Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008, and because the Custodian failed to provide to the Council any evidence that would require non-disclosure of such records, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.
- 4. The Custodian shall comply with items #2 and #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹**

⁹ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. Because the Complainant's request Items No. 2 and 4 do not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request for Items No. 2 and 4 is invalid pursuant to MAG Entertainment LLC. V. Div. 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).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010