



**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*

**FINAL DECISION**

**April 28, 2010 Government Records Council Meeting**

Joseph Dinella  
Complainant

Complaint No. 2009-142

v.

Borough of Collingswood (Camden)  
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 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. Because the Complainant’s April 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency’s files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Because the Custodian responded on the fifth (5<sup>th</sup>) business day after receipt of the Complainant’s OPRA request stating that no record responsive to the Complainant’s April 16, 2009 OPRA request for a copy of the loan agreement for the bridge loan to Lumberyard Redevelopment LLC nor any check for the disbursement of such a loan exists and subsequently certified in the Statement of Information that such records did not 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Additionally, the Custodian has borne her burden of proving a lawful denial of access and was under no



obligation to provide the requested records to the Complainant since the requested record did not exist at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-6.

3. Because request Item No. 4 of the Complainant's April 16, 2009 OPRA request seeks information rather than a specific identifiable government record, such request item is invalid under OPRA. Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
4. Although the Custodian responded in writing to the Complainant's April 16, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to respond to this request item. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
5. Although the Custodian provided an insufficient response to the Complainant's April 16, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Custodian provided access to records responsive to request Items 1 and 5 of the Complainant's April 16, 2009 OPRA request, no records responsive to request Items No. 2 and 3 of the April 16, 2009 OPRA request exist, and request Item No. 4 is invalid under OPRA because it fails to specify identifiable government records. Moreover, the Complainant's April 13, 2009 request is also invalid under OPRA because it fails to name specifically identifiable records pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). 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 28<sup>th</sup> Day of April, 2010

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: April 30, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2010 Council Meeting**

**Joseph Dinella<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-142**

v.

**Borough of Collingswood (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

April 13, 2009 request:

Copies of the following and, where it exists, an electronic copy of:

- 1) The page in the municipal budget which designates as revenue the cash receipt from the sale of The Parkview Apartments, highlighting the line item and designating the year for which this budget entry occurred;
- 2) The pages in each annual municipal budget which designate as revenue and appropriation "The Pride Grant," highlighting the line item for each of these entries;
- 3) For the grant(s) to the Collingswood Board of Education for various capital purchases, please provide the pages in each annual municipal budget which designate these funds as revenue and appropriation, highlighting the line item for each of these entries;
- 4) For the bridge loan to Lumberyard Redevelopment, LLC, and/or its successors, the pages in the municipal budget which designate as revenue and appropriations any monies loaned to the redeveloper as of the date of this request, highlighting the line item for each of these entries.

April 16, 2009 request:

Copies of the following and, where it exists, an electronic copy of:

- 1) The resolution authorizing the bridge loan to Lumberyard Redevelopment, LLC.
- 2) The loan agreement for the bridge loan to Lumberyard Redevelopment, LLC.
- 3) A photocopy of the check for the disbursement of the bridge loan.
- 4) The amount of, and to whom, the proceeds from the Bond authorized under Ordinances 1438 and 1458 that were used for the payment of interest on such obligations, accounting, engineering, legal fees and other items as provided in section 20 of the Local Bond Law, N.J.S.A. 40A:2-20.
- 5) A photocopy of each check for the payment of interest on the bond obligations, accounting, engineering, legal fees and any other disbursements for the bond authorized under Ordinance 1438 and 1458.

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

<sup>2</sup> Represented by Joseph Nardi, III, Esq. (Westmont, NJ).

**Request Made:** April 13, 2009 and April 16, 2009  
**Response Made:** April 22, 2009 and April 23, 2009  
**Custodian:** Alice Marks  
**GRC Complaint Filed:** April 28, 2009<sup>3</sup>

## Background

### **April 13, 2009**

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

### **April 16, 2009**

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

### **April 22, 2009**

Response of Bradford Stokes, Borough Administrator, to the Complainant's April 13, 2009 OPRA request, on behalf of the Custodian. Mr. Stokes responds in writing via e-mail on the seventh (7<sup>th</sup>) business day following receipt of such request. Mr. Stokes states that the appropriate page from the 2006 budget for the Parkview revenue is attached. Mr. Stokes also states that the appropriate page for the 2007 and 2008 budgets for the Pride Grant appropriation is attached and notes that the revenue is from the Parkview appropriation. Mr. Stokes further states that the appropriate page from the 2007 budget indicating \$510,000 capital appropriation for school equipment is attached and notes that the revenue was from the Capital Improvement Fund. Finally, Mr. Stokes states that because the 2009 budget is not yet complete, no record responsive to the request for the bridge loan exists.

### **April 23, 2009**

E-mail from the Complainant to Bradford Stokes. The Complainant states that Mr. Stokes omitted the highlighted line items in the revenue portion of the 2007 and 2008 budgets for these appropriations and asks Mr. Stokes to forward them as soon as possible. The Complainant further states that he has attached a copy of Borough resolution 06-88 which details the separate escrow items that the Borough must set aside for the retirement of outstanding 2006 Bonds. The Complainant states that these amounts total \$6,000,000.00. The Complainant further states that the 2007 Pride Grant totals \$550,000.00 and the 2008 Pride Grant totals \$460,000.00. The Complainant also states that the 2007 grant to the Board of Education for technology related items totals \$510,000.00. The Complainant states that the grand total for all of the obligations and expenditures is \$7,520,000.00. The Complainant asserts that the total amount of profit from the sale of Parkview was only \$7,061,260.25, leaving a deficit of \$458,739.75. The Complainant further asserts that this leaves nothing to pay for the final two years of the Pride Grant or to lend to the Lumberyard's redeveloper.<sup>4</sup>

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<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Complainant also attached additional materials which are not relevant to the adjudication of this Denial of Access Complaint.

### **April 23, 2009**

Custodian's response to the Complainant's April 16, 2009 OPRA request.<sup>5</sup> The Custodian responds in writing on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that records responsive to Items No. 2 and 3 of the OPRA request do not exist. The Custodian further states that a copy of Resolution 09-10 is available as of April 22, 2009. The Custodian also states that copies of checks authorized by Ordinance 1438 and 1458 are also available for pickup. The Custodian states that the Custodian must pay \$2.25 copy costs.

### **April 23, 2009**

E-mail from Bradford Stokes to the Complainant. Mr. Stokes states that the revenue portions do not appear as line items in the budget; therefore, there are no documents to produce. Mr. Stokes further states that on Parkview, the Complainant's numbers are not correct; sale proceeds to the Borough before defeasance were \$10,331,680.34. Mr. Stokes further states that defeasance of bonds for all costs was \$6,301,368.27 = \$4,030,312.07 balance. Mr. Stokes states that the Pride Grant is in surplus and is appropriated each year as an expenditure.

### **April 28, 2009**

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

- Complainant's OPRA request dated April 13, 2009
- Complainant's OPRA request dated April 16, 2009
- E-mail from Bradford Stokes to the Complainant dated April 22, 2009
- E-mail from the Complainant to Bradford Stokes dated April 22, 2009 (with attachments)

The Complainant asserts that, with regard to Items No. 1 and 2 of the April 13, 2009 OPRA request, Mr. Stokes' statement that "revenue is from the Parkview appropriation" is a non-sequitur. The Complainant states that this revenue must exist somewhere as a line-item, even if it exists as surplus.

The Complainant further asserts that, with regard to Items No. 3 and 4<sup>6</sup> of the OPRA request dated April 16, 2009, the Custodian's assertion that records do not exist which are responsive to the request for the loan agreement for the bridge loan to Lumberyard Redevelopment, LLC and a photocopy of the check for the disbursement of the bridge loan is not credible because there is a Borough Resolution which authorizes such a loan and reports have been published regarding such a loan, as well as because work on the project has advanced markedly since the authorization of the loan.

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<sup>5</sup> The Custodian responded in writing on a copy of the Complainant's April 16, 2009 OPRA request form.

<sup>6</sup> Although the Complainant characterizes these request Items as Nos. 3 and 4, it is clear from the Complainant's discussion that he is referring to the request for the loan agreement (request Item No. 2) and the copy of the check for disbursement of the bridge loan (request Item No. 3).

**May 12, 2009**

Offer of Mediation sent to both parties.

**May 20, 2009**

The Custodian declines mediation. The Complainant did not respond to the offer of mediation.

**July 8, 2009**

E-mail from the Custodian to the Complainant. The Custodian states that a copy of the loan agreement for the bridge loan to Lumberyard Redevelopment LLC is available for pickup in the Custodian's office. The Custodian states that the copying cost is \$3.00 for four (4) pages of records.<sup>7</sup>

**July 14, 2009**

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

**July 17, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 13, 2009
- Complainant's OPRA request dated April 16, 2009
- E-mail from Bradford Stokes to the Complainant dated April 22, 2009
- E-mail from the Complainant to Bradford Stokes dated April 22, 2009
- E-mail from Bradford Stokes to the Complainant dated April 23, 2009
- Custodian's response to the Complainant's April 16, 2009 OPRA request (with attachments)
- E-mail from the Custodian to the Complainant dated July 9, 2009

The Custodian certifies that the 2006 Parkview revenue, the 2007 and 2008 budget for the Pride Grant appropriation and the 2007 budget capital must be retained permanently under the Records Retention Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"). The Custodian further certifies that the DARM schedule requires that Resolution 9-10 must be retained permanently and that the copies of checks authorized by Ordinance 1438 and 1458 must be retained for six (6) years.

The Custodian certifies that neither the Bridge Loan Agreement nor the 2009 budget were complete at the time of the Complainant's OPRA requests. The Custodian further certifies that the requested Appropriation for school equipment was sent to the Complainant via e-mail in PDF format on April 22, 2009.

The Custodian also certifies that copy of the check for the disbursement of the bridge loan which the Complainant sought in his April 16, 2009 OPRA request did not exist at the time of the request and further certified that such checks were never issued.

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<sup>7</sup> Pursuant to a handwritten note from the Complainant on the Custodian's copy of the April 16, 2009 OPRA request form, the Complainant received these copies on July 10, 2009.

## 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 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.

In the matter now before the Council, the Complainant submitted an OPRA request on April 13, 2009, seeking various pages from the municipal budget from the Borough of Collingswood which contained references to certain sources of revenue. On behalf of the Custodian, the Borough Administrator responded in writing via e-mail on the seventh (7<sup>th</sup>) business day following receipt of such request, attaching the appropriate page from the 2006 budget for the Parkview revenue, and from the 2007 budget indicating \$510,000 capital appropriation for school equipment, as well as those pages from the 2007 and 2008 budgets for the Pride Grant appropriation are attached. The Borough Administrator further stated that because the 2009 budget is not yet complete, no record responsive to the request for the bridge loan exists. The Complainant states that the requested revenue must exist somewhere as a line-item, even if it exists as surplus.

However, the Complainant’s April 13, 2009 request is invalid under OPRA. 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. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. 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>8</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>9</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 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..."

In the matter currently before the Council, the Complainant's April 13, 2009 request sought various pages from various municipal budgets containing references to certain sources of revenue. The Complainant's request did not specify particular budget years; this request would have required the Custodian to search through every page of every budget for references to the sources of revenue which the Complainant set forth in his request. As the Appellate Division determined in MAG, "[s]uch an open-ended demand [would have] required the ... records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein[.]...While OPRA may provide access to governmental records otherwise unavailable, [this] request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit." *Id.* at 449-50. *See also* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007)(holding that a Custodian is obligated to search her files to find identifiable government records listed in the Complainant's OPRA request, but is not

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.

required to research files to figure out which records, if any, might be responsive to a broad and unclear OPRA request).

Therefore, because the Complainant's April 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency's files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

The Complainant's April 16, 2009 request sought copies of the resolution authorizing the bridge loan to Lumberyard Redevelopment, LLC (request Item No. 1) and the loan agreement therefor (request item No. 2), a copy of the check for the disbursement of the bridge loan (request Item No. 3), the amount of, and to whom, the proceeds from the Bond authorized under Ordinances 1438 and 1458 that were used for the payment of interest on such obligations, accounting, engineering, legal fees and other items as provided in section 20 of the Local Bond Law, N.J.S.A. 40A:2-20 and to whom such proceeds were paid (request Item No. 4), and a copy of each check for the payment of interest on the bond obligations, accounting, engineering, legal fees and any other disbursements for the bond authorized under two municipal ordinances (request Item No. 5).

The Custodian's timely written response to the Complainant's April 16, 2009 request provided access to copies of the resolution (request Item No. 1), as well as to copies of the checks authorized by the enumerated municipal ordinances (request Item No. 5). The Custodian's response also stated that no records responsive to the request for the loan agreement to Lumberyard Redevelopment LLC (request Item No. 2) and a copy of the check for the disbursement of the bridge loan (request item No. 3) existed. However, the Custodian's response failed to address the Complainant's request for "[t]he amount of, and to whom, the proceeds from the Bond authorized under Ordinances 1438 and 1458 that were used for the payment of interest on such obligations, accounting, engineering, legal fees and other items as provided in section 20 of the Local Bond Law, N.J.S.A. 40A:2-20." (Request Item No. 4).

The Complainant asserts that the Custodian's assertion that records do not exist which are responsive to the request for the loan agreement for the bridge loan to Lumberyard Redevelopment, LLC and a photocopy of the check for the disbursement of the bridge loan is not credible because there is a Borough Resolution which authorizes such a loan and reports have been published regarding such a loan, as well as because work on the project has advanced markedly since the authorization of the loan.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The

Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Moreover, in Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008), the Custodian responded to the Complainant's November 30, 2007 OPRA request for a proposal on the same day as receipt of the request stating that no record responsive existed. The Custodian subsequently certified in the SOI that no records responsive existed at the time of the Complainant's OPRA request, but that the Complainant was provided with a copy of the proposal after it was obtained by the BOE. The GRC held that:

“[b]ecause the Custodian in this complaint responded in writing on the same day of receipt of the Complainant's November 30, 2007 OPRA request stating that no records responsive exist, the Custodian has borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra. Further, the Custodian was under no obligation to provide the requested record to the Complainant following the Custodian's response that no record existed pursuant to Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (February 2007).”

The facts in Pusterhofer, supra, and Driscoll, supra, are similar to the instant complaint. Specifically, the Custodian in this complaint responded to the Complainant's OPRA request within the statutorily mandated seven (7) business day time frame advising that no loan agreement for the bridge loan to Lumberyard Redevelopment LLC nor any check for the disbursement of such a loan exists. The Custodian later certified in the SOI that such records did not exist. The Complainant's assertions in the Denial of Access Complaint that such records must exist because published reports reference such a loan and because work had progressed on the redevelopment project do not rise to the level of competent, credible evidence sufficient to refute the Custodian's certification.

Therefore, because the Custodian responded on the fifth (5<sup>th</sup>) business day after receipt of the Complainant's OPRA request stating that no record responsive to the Complainant's April 16, 2009 OPRA request for a copy of the loan agreement for the bridge loan to Lumberyard Redevelopment LLC nor any check for the disbursement of such a loan exists and subsequently certified in the SOI that such records did not 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 records pursuant to Pusterhofer, supra, and Driscoll, supra. Additionally, the Custodian has borne her burden of proving a lawful denial of access and was under no obligation to provide the requested records to the Complainant since the requested record did not exist at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-6.

However, Item No. 4 of the Complainant's April 16, 2009 OPRA request sought “[t]he amount of, and to whom, the proceeds from the Bond authorized under Ordinances 1438 and 1458 that were used for the payment of interest on such obligations, accounting,

engineering, legal fees and other items as provided in section 20 of the Local Bond Law, N.J.S.A. 40A:2-20.” Such request item is invalid under OPRA because it seeks information rather than a specific identifiable government record. As previously discussed herein, 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. Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); *see also* New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Therefore, because request Item No. 4 of the Complainant’s April 16, 2009 OPRA request seeks information rather than a specific identifiable government record, such request item is invalid under OPRA. Bent, *supra*; New Jersey Builders, *supra*; MAG, *supra*; Donato, *supra*.

Although request Item No. 4 of the Complainant’s April 16, 2009 OPRA request is invalid, the Custodian failed to specifically respond to this request item in her April 23, 2009 response.

OPRA provides that:

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

OPRA further provides that:

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

Although the Custodian responded in writing to the Complainant’s April 16, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to this request item. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. *See* Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

**Whether the Custodian’s failure to specifically respond to request item No. 4 of the Complainant’s April 16, 2009 OPRA request 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.

In the matter before the Council, the Custodian failed to specifically respond to request Item No. 4 of the Complainant’s April 16, 2009 OPRA request for “[t]he amount of, and to whom, the proceeds from the Bond authorized under Ordinances 1438 and 1458 that were used for the payment of interest on such obligations, accounting, engineering, legal fees and other items as provided in section 20 of the Local Bond Law, N.J.S.A. 40A:2-20.”

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 provided an insufficient response to the Complainant’s April 16, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Custodian provided access to records responsive to request Items 1 and 5 of the Complainant’s April 16, 2009 OPRA request, no records responsive to request Items No. 2 and 3 of the April 16, 2009 OPRA request exist, and request Item No. 4 is invalid under OPRA because it fails to specify identifiable government records. Moreover, the Complainant’s April 13, 2009 is also invalid under OPRA because it fails to name specifically identifiable records pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.

Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). 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. Because the Complainant's April 13, 2009 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency's files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
2. Because the Custodian responded on the fifth (5<sup>th</sup>) business day after receipt of the Complainant's OPRA request stating that no record responsive to the Complainant's April 16, 2009 OPRA request for a copy of the loan agreement for the bridge loan to Lumberyard Redevelopment LLC nor any check for the disbursement of such a loan exists and subsequently certified in the Statement of Information that such records did not 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Additionally, the Custodian has borne her burden of proving a lawful denial of access and was under no obligation to provide the requested records to the Complainant since the requested record did not exist at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-6.
3. Because request Item No. 4 of the Complainant's April 16, 2009 OPRA request seeks information rather than a specific identifiable government record, such request item is invalid under OPRA. Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

4. Although the Custodian responded in writing to the Complainant's April 16, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to respond to this request item. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
  
5. Although the Custodian provided an insufficient response to the Complainant's April 16, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Custodian provided access to records responsive to request Items 1 and 5 of the Complainant's April 16, 2009 OPRA request, no records responsive to request Items No. 2 and 3 of the April 16, 2009 OPRA request exist, and request Item No. 4 is invalid under OPRA because it fails to specify identifiable government records. Moreover, the Complainant's April 13, 2009 request is also invalid under OPRA because it fails to name specifically identifiable records pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). 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.

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In House Counsel

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Executive Director

April 21, 2010