



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

November 18, 2009 Government Records Council Meeting

Tucker Kelley
Complainant

Complaint No. 2009-19

v.

Rockaway Township (Morris)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s 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 Complainant’s request is overly broad under OPRA, the Custodian in this complaint properly requested clarification pursuant to Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), although she did so beyond the statutorily mandated seven (7) business day response period. Moreover, because the Complainant failed to clarify the request, the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).



3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended time frame resulted in a "deemed" denial, because the Complainant's OPRA request is invalid under OPRA, 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of November, 2009

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: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Tucker Kelley¹
Complainant**

GRC Complaint No. 2009-19

v.

**Rockaway Township (Morris)²
Custodian of Records**

Records Relevant to Complaint: Inspection of the personnel file of Mr. Dennis Creran (“Mr. Creran”), Zoning Officer, including complaints filed by the Complainant or two (2) other parties regarding false statements made about the Complainant, Complainant’s property and other issues, photographs of the Complainant’s property, administrative findings, letters of reprimand, disciplinary actions, notes, complaints, correspondence to and from Mr. Gregory Poff (“Mr. Poff”), Business Administrator, and Mr. Creran.

Request Made: December 10, 2008

Response Made: December 22, 2008

Custodian: Mary Cilurso

GRC Complaint Filed: January 6, 2009³

Background

December 10, 2008

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. The Complainant states that this request will aid in the preparation of his defense concerning a legal matter in which Mr. Creran is the plaintiff and requests that the Custodian provide an expedited response under the circumstances.

December 22, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eighth (8th) business day following receipt of such request. The Custodian requests clarification of the Complainant’s request. The Custodian asks if the Complainant is looking for complaints or documents in the instant matter. Additionally, the Custodian states that generally, personnel files are not government records.

¹ No legal representation listed on record.

² Represented by John M. Iacofano, Esq. of Iacofano, Fiamingo & Perrone, Esqs. (Morristown, NJ).

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

December 22, 2008

E-mail from the Complainant to the Custodian. The Complainant states that correspondence, memo, complaints, etc., would fall under the description of “documents.” The Complainant states that the Custodian’s untimely response needs to be clarified.

The Complainant states that the Custodian mentioned that in general, personnel records are not government records. The Complainant states that the Custodian should review Bzozowski v. Penn-Reading Seashore Lines, 107 N.J. Super. 467, 473 (1969), in which the court held that “[g]enerally, inspection orders should issue upon proof that the desired inspection of documents will aid plaintiff in the preparation of his case, or otherwise facilitate proof or progress at trial or that a denial would prejudice plaintiff...” The Complainant requests that the Custodian also review Moore v. Mercer County Board of Chosen Freeholders, 76 N.J. Super. 396 (App. Div. 1962), in which the court holds that:

“[c]itizens of a self-governing society must have legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. To that end they must have the right to simple, speedy enforcement procedure geared to scope with the dynamic expansion of government activity ... These rights must be elevated to a position of the highest sanction if the people are to enter into full enjoyment of their right to know. Freedom of information is the very foundation for all those freedoms that the First Amendment of our Constitution was intended to guarantee.”

The Complainant states that Mr. Creran is the plaintiff and the Complainant is the defendant in a pending legal matter, and the records requested shall assist with the Complainant’s preparation of the case or a possible appeal. The Complainant states that, although he appreciates the efforts of the Township, he believes that his OPRA request is clear.

January 6, 2009

E-mail from the Custodian to the Complainant. The Custodian states that, in the absence of further clarification, Mr. Creran’s personnel file is not a government record. The Custodian states that there are exemptions to the general rule, but the Custodian will not be able to respond until the Complainant advises as to the specific records being requested.

Additionally, the Custodian states that the Complainant is sending e-mails to her personal e-mail address and requests that the Complainant contact her through her work e-mail.

January 6, 2009

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

- Complainant's OPRA request dated December 10, 2008 with Phyllis Auerbach's ("Ms. Auerbach"), Assistant Clerk, note dated January 2, 2009 thereon.
- E-mail from the Custodian to the Complainant dated December 22, 2008.
- E-mail from the Complainant to the Custodian dated December 22, 2008.
- Copy of Bzozowski v. Penn-Reading Seashore Lines, 107 N.J. Super. 467, 473 (1969).

The Complainant states that he submitted an OPRA request via facsimile to the Custodian on December 10, 2008 and requested an expedited response from the Custodian. The Complainant states that the records he requested will aid in developing his defense in a matter in which Mr. Creran is the plaintiff.

The Complainant states that the Custodian responded on December 22, 2008 requesting clarification of the Complainant's request. The Complainant states that he responded on the same day, averring that his request was clear enough to identify records responsive. The Complainant states that he has not received a written response from the Custodian to date (as evidenced when Ms. Auerbach provided the Complainant with a copy of his original request form on January 2, 2009) and the matter presently in court has already commenced.

The Complainant contends that the Custodian's violation of timeliness is a knowing and willful violation of OPRA. The Complainant argues that he believes the Custodian's failure to respond, along with Mr. Poff's assistance in so doing, is an attempt to protect Mr. Creran and bar the Complainant from information that may assist in his legal defense.

January 7, 2009

E-mail from the Complainant to the GRC. The Complainant states that, per a telephone call on the same day, the Complainant does not agree to mediate this complaint.

January 12, 2009

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

January 12, 2009

E-mail from the Custodian to the Complainant. The Custodian states that she apologizes for not further responding to the Complainant's OPRA request because it was misplaced in her office. The Custodian states that a denial of access statement regarding the requested personnel file has been prepared for the Complainant's signature. The Custodian states that the remainder of the Complainant's request, specifically lines 2 through 7 of the second paragraph, is broad and unclear. The Custodian states that the requested photographs and portions of the Daily Log of the Construction Department that are responsive to the Complainant's request are available for review.

January 12, 2009

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian did not inform him that the OPRA request was previously lost. The Complainant states that he received a copy of his original OPRA request from Ms.

Auerbach on January 2, 2009, which showed that the Custodian had started to number the sentences in the second paragraph of the Complainant's request.⁴ The Complainant states that the Custodian made no mention of the request being lost in an e-mail dated January 6, 2009 or in another e-mail dated January 7, 2009.

The Complainant also disputes the Custodian's attempt to direct him to another e-mail address when the Custodian's initial response, as well as responses to many other matters, comes from the e-mail address he is presently using.

Finally, the Complainant states that Custodian's forwarding of an e-mail to the Complainant after business hours, following the GRC's e-mail notifying the Custodian that a complaint was filed, is suspicious.

January 15, 2009

Custodian's SOI with the following attachments:

- E-mail from the Custodian to the Complainant dated December 22, 2008.
- E-mail from the Custodian to the Complainant dated January 12, 2009.

The Custodian certifies that records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").⁵

The Custodian certifies that she received the Complainant's request on December 10, 2008. The Custodian certifies that she initially responded in writing on December 22, 2008 requesting clarification of the Complainant's request and advised that, generally, personnel records are exempt from disclosure under OPRA.

The Custodian certifies that she subsequently responded in writing to the Complainant on January 12, 2009 apologizing for having misplaced the Complainant's OPRA request. The Custodian certifies that she denied access to Mr. Creran's personnel record, provided access to the requested photographs and relevant portions of the Construction Department daily logs and advised the Complainant that the remainder of his OPRA request was broad and unclear.

The Custodian contends that her initial response was delayed due to illness. Further, the Custodian contends that the Complainant has not responded to the Custodian's request for clarification and has not responded to inspect the records made available on January 12, 2009. The Custodian asserts that it would be impossible to locate records responsive to the Complainant request without receiving clarification.

Additionally, the Custodian contends that she properly denied access to Mr. Creran's personnel file because such files are exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

⁴The Complainant states that he also asked Ms. Auerback to confirm that the Custodian did not forward a memorandum to the Department of Administration notifying them of the records request had been received.

⁵The Custodian did not certify to the search undertaken pursuant to the Complainant's OPRA request. Tucker Kelley v. Rockaway Township (Morris), 2009-19 – Findings and Recommendations of the Executive Director

February 11, 2009

The Complainant's response to the Custodian's SOI attaching the following:

- E-mail from the Custodian to the Complainant dated January 6, 2009.
- E-mail from the Custodian to the Complainant dated January 12, 2009.
- E-mail from the Complainant to the Custodian dated January 12, 2009.
- Adjourment Notice in the matter of State of New Jersey v. Tucker Kelley, Complaint/ Summons No. SC-20081726 dated December 10, 2008.
- Municipal time sheets from December 8, 2008 to January 16, 2009.⁶

The Complainant requests that the GRC consider the enclosed documentation regarding the instant complaint. The Complainant asserts that the Custodian's SOI contains several inconsistencies that must be highlighted.

The Complainant contends that the Custodian advised him on January 6, 2009 and again on January 13, 2009 that the Complainant was using the wrong e-mail address, yet in the SOI the Custodian identifies the e-mail address the Complainant has been using as the appropriate e-mail address.

Additionally, the Complainant asserts that the Custodian denied access to Mr. Creran's personnel file in the January 6, 2009 e-mail but failed to provide any lawful basis for such denial.

Further, the Complainant takes issue with the Custodian's statement that her response was delayed due to illness. The Complainant avers that a review of the Custodian's timesheets for those dates between the date of the request and the date of her initial response reveals that the Custodian was never absent during the seven (7) business days following receipt of the Complainant's request. The Complainant notes that the Custodian was not at work on January 2, 2009, the same day the Complainant retrieved his OPRA request from Ms. Auerbach. The Complainant asserts that the Custodian dated the SOI January 15, 2009, even though her time sheet reveals that she was out of the office on the same date. The Complainant also asserts that the Custodian failed to advise the Complainant of said absences or illnesses in any correspondence between December 10, 2008 and January 13, 2009.

Finally, the Complainant requests that the GRC review the adjourment notice dated December 10, 2008 from the Township of Montville Municipal Court, which was received by Mr. Poff on December 12, 2008. The Complainant contends that the Administration, Construction and Zoning departments were informed that the trial commencement date was December 19, 2008. The Complainant contends that the officials notified are also part of the process of gathering records for the Complainant's instant request.

⁶The Complainant attached two (2) additional e-mails that address the issue involving the Custodian's correct e-mail address.

The Complainant argues that it is still his belief that the Custodian and administration knowingly and willfully delayed and denied access to the records requested to hinder the Complainant's ability to defend himself in court.

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 also 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.

Further, OPRA 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.

The GRC first turns to the issue of whether the Custodian responded to the Complainant's OPRA request in a timely manner.

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.⁷ 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).

The Custodian in this complaint responded to the Complainant's OPRA request on December 22, 2008, or the eighth (8th) business day after receipt of the Complainant's request, denying access to Mr. Creran's personnel file and requesting clarification of the remainder of the Complainant's request.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request for to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

Next, the GRC examines whether the Complainant's OPRA request for Mr. Creran's “personnel file ... including any/all complaints, ... photographs, ... administrative findings, letters of reprimand, disciplinary actions, notes, [and] correspondence” is an overly broad request.

The GRC notes initially that personnel records of any individual in the possession of a public agency, shall not be considered a government record under OPRA and shall not be made available for public access, except for limited information regarding an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received,

⁷ 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.

among other exceptions. N.J.S.A. 47:1A-10. However, the Complainant's request specified a number of additional records sought including complaints, photographs, administrative findings, letters of reprimand, disciplinary actions, notes and correspondence to and from the Business Administrator, Mr. Poff, and Mr. Creran. The request failed to specify dates or time periods, or other identifiable criteria, which would have enabled the Custodian to locate responsive records.

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),⁸ 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."⁹

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..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests [No.] 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)."

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Complainant requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Council stated that:

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

⁹ As stated in Bent, *supra*.

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’¹⁰ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’¹¹”

In the instant complaint, although the Complainant identified certain types of government records and provided a general nature description of the subject of the records, the Custodian would have had to research her files to locate and identify records responsive to the Complainant’s request.

Therefore, because the Complainant only identified types of records in his OPRA request, and failed to specify the dates or time periods within which the records requested were created, or other identifiable criteria, the Custodian is not required to conduct research in response to a request pursuant to Donato, *supra*.

Additionally, in Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), the Custodian responded to the Complainant’s overly broad request seeking clarification. The Complainant filed a complaint contending that the Custodian violated OPRA by unlawfully denied access to three (3) items of the Complainant’s request as too broad in scope. The Council held that

“[u]nder the circumstances, the Custodian reasonably sought clarification from the Complainant...in order to fulfill the OPRA request ... The Custodian is proper in requiring clarification when a request is too broad in scope and a reasonable basis exists to seek said clarification.”

In the instant complaint, although the Custodian responded on December 22, 2008, eight (8) business days after receipt of the Complainant’s request, she requested clarification of the Complainant’s request. The Complainant responded stating that he wished to obtain documents, but failed to further narrow the scope of his request. Therefore, the Custodian in this complaint properly requested clarification pursuant to Leibel, *supra*.

Therefore, because the Complainant’s request is overly broad under OPRA, the Custodian in this complaint properly requested clarification pursuant to Leibel, *supra*, although she did so beyond the statutorily mandated seven (7) business day response period. Moreover, because the Complainant failed to clarify the request, the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, N.J. Builders, *supra*, and Schuler, *supra*. Donato, *supra*. See also Verry v.

¹⁰ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹¹ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Tucker Kelley v. Rockaway Township (Morris), 2009-19 – Findings and Recommendations of the Executive Director

Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Whether the Custodian’s delayed response 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 provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial, because the Complainant’s OPRA request is invalid under OPRA, 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's 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 Complainant's request is overly broad under OPRA, the Custodian in this complaint properly requested clarification pursuant to Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), although she did so beyond the statutorily mandated seven (7) business day response period. Moreover, because the Complainant failed to clarify the request, the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended time frame resulted in a "deemed" denial, because the Complainant's OPRA request is invalid under OPRA, 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009