



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Raymond Bunce
Complainant

Complaint No. 2009-229

v.

Township of Allamuchy (Warren)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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. Although the Custodian responded in writing in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to provide a specific lawful basis for denying access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Although the Custodian’s insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian certified in the Statement of Information that no “Preliminary Applications for Affordable Housing” existed and later certified that the records provided to the Complainant differ from those requested, and because the Complainant has not provided any credible, competent evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested applications responsive to the Complainant’s July 13, 2009 OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the portion of the Complainant’s July 13, 2009 request seeking “... occupancy status and all other records available through OPRA,” fails to identify the specific government records sought, that portion of the Complainant’s request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied access to that portion of the Complainant’s request. N.J.S.A. 47:1A-6.



4. Although the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to provide a specific lawful basis for denying access to the requested records, the Custodian certified that no "Preliminary Applications for Affordable Housing" existed and the portion of the Complainant's request seeking "... occupancy status and all other records available through OPRA," is invalid. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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 May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Raymond Bunce¹
Complainant**

GRC Complaint No. 2009-229

v.

**Township of Allamuchy (Warren)²
Custodian of Records**

Records Relevant to Complaint: Initial New Jersey Council on Affordable Housing (“COAH”) applications determining eligibility for Unit 271, Old Farm Drive, Allamuchy, New Jersey for two (2) separate tenants between 2007-2009, including occupancy status and all other records available through OPRA.

Request Made: July 13, 2009

Response Made: July 22, 2009

Custodian: Ann Marie Tracy

GRC Complaint Filed: July 27, 2009³

Background

July 13, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint in a letter referencing OPRA.

July 22, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that she has on file all lease agreements for the COAH units located in the Village of Old Farm. The Custodian states that all applicant files and documents are on file with Community Grants & Planning (“CG&P”), the company administering the affordable housing program.

The Custodian states that CG&P has advised her that the records requested are exempt from disclosure under OPRA. The Custodian states that based on the foregoing, access to the requested records is denied because the records are confidential.

July 27, 2009

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

¹ No legal representation listed on record.

² Represented by Edward Wacks, Esq., of Wacks & Hartmann, LLC (Morristown, NJ).

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

- Complainant's letter request dated July 13, 2009.
- Letter from the Custodian to the Complainant dated July 22, 2009.
- Copy of a "Preliminary Application for Affordable Housing" the Complainant used to apply for Allamuchy housing.

The Complainant states that he submitted a letter request to the Township of Allamuchy ("Township") on July 13, 2009 which was received by the Township on July 14, 2009.

The Complainant states that he spoke with the Custodian on July 17, 2009, who advised that if the records were subject to disclosure, redactions may be necessary for any privileged information.⁴ The Complainant states that the Custodian further advised that the Complainant's letter request was forwarded to CG&P.

The Complainant states that he received the Custodian's July 22, 2009 written response denying access to the requested records on July 23, 2009. The Complainant states that the Custodian further stated that she contacted CG&P and was advised that access to the requested records was denied due to confidentiality concerns; however, no specific lawful basis for the denial of access to the requested records was provided.

The Complainant argues that the requested records are subject to disclosure pursuant to OPRA.

The Complainant does not agree to mediate this complaint.

August 17, 2009

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

August 20, 2009

E-mail from Mr. Marc Leckington ("Mr. Leckington"), Vice President of CG&P, to the Custodian attaching two (2) applications for Unit 271, Old Farm Drive. Mr. Leckington states that attached are the two (2) full applications for Unit 271, Old Farm Drive.

Mr. Leckington states that as discussed on the telephone, there are no "initial applications" for these tenants because there was no waiting list. Mr. Leckington states that tenants were being taken on a "first come, first served" basis as permitted under the COAH rules. Mr. Leckington states that he has not heard back from his contact at the New Jersey Department of State, Division of Archives and Records Management ("DARM") regarding whether full or pre-applications are exempt under OPRA.⁵

August 21, 2009

Custodian's SOI attaching the Complainant's letter request dated July 13, 2009.

⁴ The Complainant acknowledges that these redactions would be reasonable.

⁵ The GRC notes that DARM is generally responsible for records retention schedules and storage of government records and not the provisions of OPRA.

The Custodian certifies that her search involved contacting CG&P.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by DARM.

The Custodian certifies that she received the Complainant's letter request on July 14, 2009. The Custodian states that the Complainant appears to be seeking any completed "Preliminary Application for Affordable Housing" submitted by the tenant in Unit 271, Old Farm Drive between 2007 and 2009.⁶

The Custodian states that Unit 271, Old Farm Drive, as well as the unit occupied by the Complainant, are affordable housing units owned by the Township. The Custodian states that pursuant to a contract, the Township uses an entity named CG&P to oversee the affordable housing qualification process for its tenants. The Custodian states that as such, the requested records are not maintained by her office but by CG&P. The Custodian states that she forwarded the Complainant's letter request to CG&P, who advised that the records sought are exempt from disclosure under OPRA. The Custodian certifies that she responded in writing to the Complainant on July 22, 2009 stating that CG&P advised the Custodian that access to the requested records was denied because the records are confidential.

The Custodian certifies that the records requested by the Complainant do not exist. The Custodian certifies that CG&P advised on August 20, 2009 that no "Preliminary Applications for Affordable Housing" filed for Unit 271 during the time period in question existed because there was no waiting list during said period for that unit; thus, tenants were accepted on a "first come, first served" basis in accordance with COAH regulations. The Custodian asserts that there can be no unlawful denial of access to records that do not exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

The Custodian argues that even if the records did exist, they would be exempt from disclosure under OPRA, which provides that:

"... a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1.

Moreover, the Custodian contends that the records requested were specifically addressed in Executive Order No. 26 (McGreevey, 2002)("E.O. No. 26"), which provides that records "...describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed," are not considered government records subject to access pursuant to N.J.S.A. 47:1A-1 et seq. The Custodian asserts that this is

⁶ The Custodian notes that the Complainant, who occupies the unit below Unit 271, attached to the Denial of Access Complaint a copy of his own "Preliminary Application for Affordable Housing" containing redactions for personal information.

precisely the type of information contained in the records requested by the Complainant, as shown by the example attached to the Denial of Access Complaint.⁷

August 28, 2009

Letter from the Complainant to the GRC. The Complainant states that he has not received the Custodian's SOI as of this date. The Complainant asserts that although he has not yet received the SOI, it seems that the Custodian and CG&P are indicating different reasons for denying access to the requested records without citing a specific lawful basis. The Complainant notes that OPRA requires redactions for information deemed to be confidential contained within a record pursuant to N.J.S.A. 47:1A-5, yet access to the entire record was denied. The Complainant states that he is not seeking financial information.

The Complainant states that according to *N.J.A.C. 5:80-26.14(a)8*, *N.J.A.C. 5:80-26.15(c)* and *N.J.A.C. 5:80-26.17*, current records must be maintained by the administrative agency (*i.e.*, CG&P) and outdated records must be given to the municipality for safekeeping throughout its control period, which is thirty (30) years. (*Citation omitted.*) The Complainant asserts that the requested records are not outdated, as the identified time frame only goes back for two (2) years. The Complainant asserts that municipalities are required to maintain control of the records requested, therefore it seems unlikely that the requested records do not exist or the Custodian was unable to obtain them.

The Complainant asserts that if the Custodian's allegations are true, then additional questions concerning the Custodian's response are raised. Specifically, the Complainant states that the Custodian advised that she had all lease agreements for the COAH units in her possession. The Complainant asserts that his intent in filing the letter request was to request all records available through OPRA, which should encompass any responsive lease agreements that the Custodian has on file. The Complainant asserts that the Custodian would not have needed to consult with CG&P because records responsive were in the Custodian's possession. Moreover, the Complainant asserts that although CG&P is responsible for the administrative aspects of applications (as stated by the Custodian in her letter dated July 22, 2009), the Township is still responsible for the records despite their location.

The Complainant states that per his letter request he seeks all records including leases, applications, records and files that are not otherwise exempt under OPRA pertaining to two (2) separate tenants from August 2007 to August 2008 and September/October 2008 to the present. The Complainant notes that if he is not granted access the leases filed with the Custodian, a specific lawful basis for denying access for applications held by CG&P should be provided.

August 29, 2009

The Complainant's response to the Custodian's SOI with the following attachments:

⁷ The Custodian sets forth arguments regarding common law access to public records; however, the GRC has no jurisdiction to adjudicate these issues. See Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. LEXIS 1444, 4-5 (App. Div. Dec. 5, 2006).

- The Complainant's lease (with redactions).
- Page 6 of "The Panther" dated September 2007.

The Complainant states that he is in receipt of the Custodian's SOI and submits this response as an addendum to his letter to the GRC dated August 28, 2009.

The Complainant states that the Custodian asserts in the SOI that the letter request "appears to have sought any completed Preliminary Application for Affordable Housing ...". The Complainant states that the letter request notes that the Custodian's response should include occupancy status and all records available through OPRA that are not otherwise exempt. The Complainant reiterates that he did not request financial information and challenges the Custodian to comply with N.J.S.A. 47:1A-5.g. by providing a specific lawful basis for denying access to the entirety of the records requests.

The Complainant reiterates his confusion regarding the Custodian's legal certification that the records responsive do not exist, which he believes contradicts her initial response to the OPRA request which stated that access to the requested records was denied due to confidentiality of the records. Moreover, the Complainant questions whether the Custodian has been adhering to *N.J.A.C.* 5:80-26.14(a)8, *N.J.A.C.* 5:80-26.15(c) and *N.J.A.C.* 5:80-26.17. Specifically, the Complainant states that he moved into his unit in April 2007 while the first tenant moved into Unit 271 in August 2007. The Complainant questions that if no preliminary applications were needed because there was no waiting list, then why was he required to file such an application in 2007? The Complainant also questions whether the Custodian's waiting list argument pertained to 2007-2008 or 2008-2009.

The Complainant reiterates that his request sought all records not exempt from disclosure under OPRA; therefore, the Custodian should have at the very least provided him with those leases responsive to his letter request. The Complainant asserts that these leases, similar to the one attached, contain no financial information and are likely standard leases varying only in name, rent amount and unit number. The Complainant asserts that minimal redaction of the leases would be needed.⁸

The Complainant disputes the Custodian's allegation that no unlawful denial of access occurred pursuant to Pusterhofer, *supra*, because the OPRA request encompasses all applications and records between 2007 and 2009 regarding Unit 271. Further, the Complainant argues that privacy exemptions in N.J.S.A. 47:1A-1 et seq., do not apply here because the community publishes a monthly magazine titled "The Panther" with a section that lists the names and addresses of new community residents. Moreover, the Complainant argues that telephone numbers are regularly published in a handbook for the community.⁹

⁸ The Complainant notes that if absolutely necessary, he would file a second OPRA request to obtain the leases.

⁹ The Complainant responds to the Custodian's arguments in the SOI regarding common law access to public records; however, the GRC has no jurisdiction to adjudicate this issue.

In closing, the Complainant reiterates that he is not requesting financial data and expresses disappointment that the Township would accuse him of using the records to harass another individual.

February 16, 2010

Letter from the Complainant to the Custodian. The Complainant states that in light of the Custodian's response to a recent letter request not at issue here,¹⁰ the Complainant is renewing his letter request for the records relevant to this complaint for the time period 2008-2009. The Complainant notes that he is seeking the non-amended applications (and not necessarily the record with any amendments contained therein). The Complainant states that the records responsive should include the initial applications provided to CG&P, as well as the corresponding leases. The Complainant states that he is not requesting financial information.¹¹

February 24, 2010

Letter from the Custodian to the Complainant. The Custodian states that she is in receipt of the Complainant's renewed letter request and that said request is being addressed and researched. The Custodian states that any available records will be provided to the Complainant via mail as soon as possible.

March 1, 2010

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's letter dated February 24, 2010 responding to the Complainant's renewed letter request. The Complainant states that in said letter, the Custodian stated that if the requested records were available, same would be provided to the Complainant as soon as possible via mail.

The Complainant states that the Custodian has already advised that the lease agreements were on file at the Township. The Complainant avers that he believes the Custodian is still in violation of N.J.S.A. 47:1A-5.g.

March 4, 2010

Letter from the Custodian to the Complainant. The Custodian states that attached are the affordable housing applications requested by the Complainant. The Custodian states that per the Complainant's request and in accordance with Executive Order No. 21 (McGreevey 2002)("E.O. No. 21") and E.O. No. 26, financial information and confidential personal information is redacted. The Custodian further states that the requested leases are also attached.

¹⁰ The evidence of record indicates that the Complainant submitted a letter request to the Custodian on February 2, 2010 for records similar to those at issue in this complaint and was granted access to same prior to renewing his letter request for the records relevant to this complaint.

¹¹ Although the GRC recognizes that this letter is a second (2nd) OPRA request for the records at issue in this complaint, the GRC declines to address this request as part of the complaint because it was submitted well after the filing of the instant complaint.

April 6, 2010

Letter from the Complainant to the GRC with the following attachments:

- Application for affordable housing dated May 1, 2007.
- Application for affordable housing dated December 18, 2007.
- Letter from the Custodian to the Complainant dated March 4, 2010.
- Township public meeting minutes dated February 23, 2010.

The Complainant states that on March 4, 2010, the Township finally provided him with the records responsive to his letter request nearly eight (8) months after submission of said request. The Complainant states that it is disappointing that he had to file multiple OPRA requests and this complaint in order to receive the requested records. The Complainant states that the Township adamantly argued against disclosure, even going so far as to say no records responsive existed.

The Complainant states that in addition to the two (2) leases provided, the Complainant also received two (2) applications to which the Custodian initially denied access. The Complainant reiterates that although the Township entered into a contract with CG&P to provide administrative assistance on COAH matters, the Township ultimately had control over the records maintained by CG&P. The Complainant states that the SOI indicates that the CG&P initially advised the Custodian that no preliminary applications for Unit 271 existed within the time period identified; however, these records were later provided. The Complainant acknowledges that the Custodian may not have been able to access the records immediately because the applications were maintained by CG&P, but the Custodian ultimately should have been able to obtain and provide access to the records sooner than eight (8) months after the Complainant's initial OPRA request.

Further, the Complainant questions why employment information was not redacted from the two (2) applications provided and whether said information is subject to disclosure. The Complainant questions whether the Custodian's response was insufficient because she failed to provide a specific lawful basis for denying access to the requested records. The Complainant further questions whether the Custodian misrepresented the true language of E.O. No. 26 when she argued in the SOI that entire records containing personal information are exempt when instead E.O. No. 26 only exempts those portions of the records.¹²

January 19, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of clarification of the Custodian's certification in the SOI that no records responsive to the Complainant's letter request exist.

The GRC states that in the SOI, the Custodian certified that the applications requested by the Complainant do not exist. The GRC states that the Custodian further certified that CG&P advised on August 20, 2009 that no "Preliminary Applications for

¹² The Complainant requests that this complaint remain open and that the GRC complete the adjudication process.

Affordable Housing” were filed for Unit 271, Old Farm Drive for the time period 2007-2009 because there was no waiting list. The GRC states that the Custodian subsequently provided two (2) applications to the Complainant on March 4, 2010.

The GRC requests that the Custodian certify to the following:

1. Whether there is a difference between the applications provided to the Complainant on March 4, 2010 and the “Preliminary Applications for Affordable Housing” similar to the one attached to the Denial of Access Complaint?
2. Whether applications similar to the one attached to the Denial of Access Complaint responsive to the Complainant’s letter request exist?
3. Whether the records provided to the Complainant on March 4, 2010 represent all records responsive to the Complainant’s letter request?

The GRC requests that the Custodian submit the requested legal certification by close of business on January 26, 2011.

January 25, 2011

Custodian’s legal certification attaching an e-mail from Mr. Marc Leckington (“Mr. Leckington”), Vice President of CG&P, to the Custodian.

The Custodian certifies that in response to question No. 1, there is a difference between the applications provided to the Complainant on March 4, 2010 (entitled “Application for Affordable Housing”) and the “Preliminary Applications for Affordable Housing” similar to the one attached to the Denial of Access Complaint. The Custodian certifies that in addition to the difference in the record’s name, the “Preliminary Application” is a one (1) page document that requires the applicant to provide basic information concerning income and those persons residing in the affordable housing unit. The Custodian certifies that on the other hand, the “Application for Affordable Housing” is a five (5) page document that seeks detailed personal, financial and employment information. Additionally, the Custodian certifies that the “Preliminary Application” requires only an applicant’s signature, while the “Application for Affordable Housing” requires a signed certification.

The Custodian certifies that each application serves a different purpose. The Custodian certifies that the “Preliminary Application” provided by the Complainant as part of the Denial of Access Complaint is used to pre-screen applicants when there is a waiting list for affordable housing. The Custodian certifies that the “Application for Affordable Housing” is used to determine the applicant’s qualifications to reside in the unit.

The Custodian certifies that in response to question No. 2, no applications similar to the “Preliminary Application” attached to the Denial of Access Complaint and responsive to the Complainant’s letter request exist. The Custodian certifies that following receipt of the Complainant’s letter request, she contacted Mr. Leckington for assistance regarding the request. The Custodian certifies that in her telephone conversation with Mr. Leckington (memorialized in an e-mail dated August 20, 2009), he advised the Custodian that no initial or preliminary applications with respect to Unit 271,

Old Farm Drive exist because at the time there was no waiting list and tenants were being taken on a “first come, first served” basis as permitted under COAH rules. The Custodian certifies that there was a waiting list when the Complainant applied for a unit and as such preliminary applications were being accepted.

The Custodian certifies that in response to question No. 3, the applications provided to the Complainant on March 4, 2010 were provided to him as an accommodation. The Custodian certifies that as previously noted, no records responsive to the Complainant’s actual request existed.

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 ... If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” 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 to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. 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....” 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’s response to the Complainant’s letter request was sufficient.

In the matter now before the Council, the Custodian responded to the Complainant’s letter request within the statutorily mandated seven (7) business days stating that the CG&P, which maintained applicants’ files on behalf of the Township, had advised that the requested records were exempt from disclosure under OPRA as confidential. The Complainant argued in the Denial of Access Complaint that the Custodian never provided a specific lawful basis for denying access to the requested records.

OPRA provides that if a “...custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor ... on the request form and promptly return it to the requestor” N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records. The GRC held that:

“... the Council’s decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See Seabrook v. Cherry Hill Police Department*, GRC Complaint No. 2004-40 (April 2004), *Rosenblum v. Borough of Closter*, GRC Complaint No. 2005-16 (October 2005) and *Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA. *See Morris v. Trenton Police Department*, GRC Complaint No. 2007-160 (May 2008).

Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, supra, Rosenblum, supra, Paff, supra and Morris, supra." *Id.* at pg. 7.

In this complaint, the Custodian responded to the Complainant's OPRA request stating that the CG&P advised that the records were not subject to OPRA because they were confidential. Although the Custodian responded within the statutorily mandated seven (7) business day time frame in accordance with N.J.S.A. 47:1A-5.i., she failed to provide a specific lawful basis for said denial. Therefore, although the Custodian responded in writing in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to provide a specific lawful basis for denying access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, supra.

The GRC next turns to the issue of whether the Custodian unlawfully denied access to the requested records.

The Custodian certified in the SOI that no "Preliminary Applications for Affordable Housing" existed and that consequently there was no unlawful denial of access to the requested records pursuant to Pusterhofer, supra. Moreover, the Custodian argued that if said records did exist, the records would be exempt from disclosure pursuant to E.O. No. 26 because they contain financial information.

The Complainant, in his response to the SOI, expressed his confusion regarding the Custodian's legal certification that the records responsive do not exist, which he believed contradicted her initial response to the OPRA request which stated that access to the requested records was denied due to confidentiality of the records.

Based on the confusion regarding the Custodian's certification that no "Preliminary Applications for Affordable Housing" existed, the GRC requested that the Custodian legally certify to the following:

1. Whether there is a difference between the applications provided to the Complainant on March 4, 2010 and the "Preliminary Applications for Affordable Housing" similar to the one attached to the Denial of Access Complaint?
2. Whether applications similar to the one attached to the Denial of Access Complaint responsive to the Complainant's letter request exist?
3. Whether the records provided to the Complainant on March 4, 2010 represent all records responsive to the Complainant's letter request?

The Custodian responded on January 25, 2011 certifying that there is a difference between "Preliminary Applications for Affordable Housing" and the applications provided to the Complainant. The Custodian further certified that she was advised by the CG&P in an e-mail dated August 20, 2009 that no initial or preliminary applications with respect to Unit 271, Old Farm Drive exist because at the time there was no waiting list and tenants were being taken on a "first come, first served" basis as permitted under

COAH rules. The Custodian finally certified that the records provided to the Complainant on March 4, 2009 were provided as an accommodation because no records responsive to the Complainant's actual request existed.

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 complainant submitted no evidence to refute the custodian's certification. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed and there was no evidence in the record to refute the custodian's certification.

Therefore, although the Custodian's insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian certified in the SOI that no "Preliminary Applications for Affordable Housing" existed and later certified that the records provided to the Complainant differ from those requested, and because the Complainant has not provided any credible, competent evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested applications responsive to the Complainant's July 13, 2009 OPRA request pursuant to Pusterhofer, *supra*.

Moreover, the Complainant asserted in letters to the GRC dated August 28, 2009 and August 29, 2009 that his request encompassed not only the applications sought, but all records not otherwise exempt from disclosure under OPRA relating to Unit 271, Old Farm Drive, within the identified time frame of 2007-2009. The Complainant asserted that the Custodian's certification in the SOI that no records responsive exist is contrary to her initial response which stated that she maintained lease agreements at her office.

In addition to the initial applications, the Complainant also sought "... occupancy status and all other records available through OPRA." This portion of the Complainant's OPRA request fails to identify with reasonable clarity those records sought. 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.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹³ 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.”¹⁴

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

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 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 the instant complaint, the portion of the Complainant’s July 13, 2009 request seeking “... occupancy status and all other records available through OPRA,” fails to identify specific government records sought; rather, said request would require the Custodian to research her records to find all records that apply to Unit 271, Old Farm Drive regarding two (2) tenants between 2007-2009. OPRA does not countenance an open-ended search of a public agency’s files. MAG, *supra*, at 549.

¹³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁴ As stated in Bent, *supra*.

Therefore, because the portion of the Complainant's July 13, 2009 request seeking "... occupancy status and all other records available through OPRA," fails to identify the specific government records sought, that portion of the Complainant's request is invalid under OPRA pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. As such, the Custodian has not unlawfully denied access to that portion of the Complainant's request. N.J.S.A. 47:1A-6.

The Complainant also questioned whether the Custodian misquoted E.O. No. 26 when she stated that the records responsive were not subject to disclosure in their entirety because said records included financial information. The Complainant asserted several times in his submissions that he does not seek financial information.

Finally, the GRC notes that the Complainant did not dispute the redactions made by the Custodian on the records provided on March 4, 2010; rather, he questioned whether the employment histories for the persons contained within the applications should have also been redacted. OPRA provides that the GRC shall "... receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." N.J.S.A. 47:1A-7.b. The Council has not previously ruled on the issue of whether employment histories of members of the citizenry should be disclosed. However, OPRA also does not address the disclosure of information that may have been erroneously left unredacted.

Whether the Custodian's actions rise 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 (Felder 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 Raymond Bunce v. Township of Allamuchy (Warren), 2009-229 – Findings and Recommendations of the Executive Director

(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 response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to provide a specific lawful basis for denying access to the requested records, the Custodian certified that no "Preliminary Applications for Affordable Housing" existed and the portion of the Complainant's request seeking "... occupancy status and all other records available through OPRA," is invalid. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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. Although the Custodian responded in writing in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to provide a specific lawful basis for denying access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009).
2. Although the Custodian's insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g., because the Custodian certified in the Statement of Information that no "Preliminary Applications for Affordable Housing" existed and later certified that the records provided to the Complainant differ from those requested, and because the Complainant has not provided any credible, competent evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested applications responsive to the Complainant's July 13, 2009 OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the portion of the Complainant's July 13, 2009 request seeking "... occupancy status and all other records available through OPRA," fails to identify the specific government records sought, that portion of the Complainant's request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151

(February 2009). As such, the Custodian has not unlawfully denied access to that portion of the Complainant's request. N.J.S.A. 47:1A-6.

4. Although the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to provide a specific lawful basis for denying access to the requested records, the Custodian certified that no "Preliminary Applications for Affordable Housing" existed and the portion of the Complainant's request seeking "... occupancy status and all other records available through OPRA," is invalid. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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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Executive Director

April 20, 2011