



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Caryl VanBaaren
Complainant

Complaint No. 2009-262

v.

City of Bayonne (Hudson)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 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. Because Mr. Cresci’s response to the Complainant’s failed to address each request item and did not provide a lawful basis for a denial, Mr. Cresci’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2001-272 (May 2008).
2. Although Mr. Cresci responded in writing to the Complainant’s August 5, 2008 OPRA request on the fifth (5th) business day following receipt thereof, Mr. Cresci’s insufficient response to the Complainant’s August 5, 2008 OPRA request neither granted access, denied access, sought clarification or requested an extension of time, resulting 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).
3. Mr. Coffey’s failure to respond in writing to the Complainant’s OPRA request dated August 18, 2008 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).
4. Because Mr. Coffey’s response to the Complainant’s failed to address each request item and did not provide a lawful basis for a denial, Mr. Coffey’s response was



insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2001-272 (May 2008).

5. Because Mr. Zuk has certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request and request Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request, and because there is no credible evidence in the record to refute Mr. Zuk's certification, Mr. Zuk 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). N.J.S.A. 47:1A-6.
6. Because request Items No. 2 and No. 3 of the Complainant's August 5, 2008 request seek information and fail to identify specific government records sought, such request Items are invalid under OPRA 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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
7. Although Mr. Cresci violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's August 5, 2008 OPRA request, thereby resulting in a deemed denial of said request, and Mr. Coffey violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant August 18, 2008 OPRA request by failing to address each request item and did not provide a lawful basis for a denial and furthermore, Mr. Coffey failed to respond to the Complainant's August 18, 2008 OPRA request within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., resulting in a deemed denial of said request, Mr. Zuk certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request and Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request, and the Complainant's August 5, 2008 request Items No. 2 and No. 3 are invalid under OPRA because these request items seek information rather than a specific identifiable government record, 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 Mr. Cresci and Mr. Coffey's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 25th Day of January, 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: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Caryl VanBaaren¹
Complainant**

GRC Complaint No. 2009-262

v.

**City of Bayonne (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

August 5, 2008:

1. Names of employees who worked from home from January 7, 2007 to the present, the circumstances under which this occurred and the duration thereof;
2. Names of employees who have access to the City's Internet network and under what circumstances they have been denied access to the network;
3. Names of employees who have access to the City's Internet network and what, if any, sites they can access.

August 18, 2008:³

1. Copy of Mr. Paul Zuk's reply to Ms. Russo's memorandum dated April 17, 2008 asking Mr. Zuk to provide a listing of all websites accessed and attempted to be accessed by Caryl Van Baaren;
2. List of employees who were required to supply a list of all the internet sites they would have to access from January 7, 2007 to the present.

Request Made: August 5, 2008 and August 18, 2008

Response Made: August 12, 2008 and September 29, 2008⁴

Custodian: Robert F. Sloan

GRC Complaint Filed: September 17, 2009⁵

¹ No legal representation listed on record.

² Represented by Charles D'Amico, Esq., of the City of Bayonne Law Department (Bayonne, NJ).

³ The evidence of record indicates that the Complainant filed two (2) separate OPRA requests on August 18, 2008; the GRC has consolidated these requests into one for simplification of the issues.

⁴ The response dated August 12, 2008 correlates to the OPRA request dated August 5, 2008 and the response dated September 29, 2008 correlates to the OPRA request dated August 18, 2008.

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

Background

August 5, 2008

Complainant's first (1st) Open Public Records Act (OPRA) request. The Complainant requests the records relevant to this request listed above in a memorandum attached to an official OPRA request form.

August 7, 2008

Memorandum from the Custodian to Peter Cresci ("Mr. Cresci"), Business Administrator. The Custodian states that he is forwarding the Complainant's August 5, 2008 OPRA request to Mr. Cresci. The Custodian also asks Mr. Cresci to inform him when a response is ready.

August 12, 2008

Letter from Mr. Cresci to the Complainant. Mr. Cresci responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt thereof. Mr. Cresci states that he is in receipt of the Complainant's OPRA request dated August 5, 2008. Mr. Cresci further states that the Complainant's request does not meet the requirements of OPRA. Mr. Cresci states that a monetary deposit is required and asks the Complainant to send a \$10.00 deposit for her request.

August 15, 2008

Letter from the Complainant to the Custodian. The Complainant states that in response to the letter from Mr. Cresci dated August 12, 2008, enclosed is a check for \$10.00.

August 18, 2008

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this request listed above in a memorandum attached to an official OPRA request form.⁶ The Complainant encloses two (2) checks for \$10.00 each for the requests.

August 21, 2008

Memorandum from the Custodian to Mr. Cresci. The Custodian states that he received three (3) checks in the amount of \$10.00 each for the Complainant's OPRA requests dated August 5, 2008 and August 18, 2008. The Custodian also attaches the Complainant's OPRA requests dated August 18, 2008 and asks Mr. Cresci to inform him as to the City's response and the associated cost, if any.

September 2, 2008

Letter from the Complainant to the Custodian. The Complainant states that she has not yet received any response to her OPRA requests.

⁶ The evidence of record indicates that the Complainant filed two (2) separate OPRA requests on August 18, 2008; the GRC has consolidated such requests in this adjudication.
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September 29, 2008

Memorandum from John F. Coffey, II, (“Mr. Coffey”) Law Director, to the Complainant. Mr. Coffey responds in writing to the Complainant’s OPRA requests dated August 18, 2008 on the twenty-ninth (29th) business day following receipt thereof. Mr. Coffey states that no record exists which is responsive to the request for Item No. 2 of the Complainant’s August 18, 2008 OPRA request, *i.e.*, a list of employees who were required to supply a list of all the internet sites they would have to access from January 7, 2007 to the present. Mr. Coffey further states that no such list is made by the City. Mr. Coffey states that when an employee attempts to visit a particular website and is rebuffed, the employee advises his or her Director that access to such website is necessary and, if the Director agrees, the Director contacts the City’s Information Technology Department and arranges access. Mr. Coffey also states that review of the Complainant’s past Internet usage reveals that the Complainant has access to the following websites: www.njlottery.com, www.discovery.com, www.harrahs.com, www.yamaha.com, www.nytimes.com, www.jjournal.com, and www.foxnews.com.⁷

September 2, 2009

Letter from the Complainant to the Custodian. The Complainant states that in August 2008, she sent three (3) OPRA requests for records and was informed that her requests did not meet the requirements of the statute. The Complainant also states that she was required to pay \$10.00 to the City for each records request. The Complainant states that she paid a total of \$30.00 to the City for the records requested.

The Complainant states that she did not receive a response to any of her OPRA requests. The Complainant also states that it has been one (1) year and two (2) weeks since her August 5, 2008 and August 18, 2008 OPRA requests, and the City’s failure to respond to such requests could be considered a willful violation of OPRA.

September 9, 2009

Memorandum from Mary Beth Golden (“Ms. Golden”), Records Manager, to Terrence Malloy (“Mr. Malloy”), Business Administrator, and Paul Zuk (“Mr. Zuk”), Information Technology Department.⁸ Ms. Golden states that she has attached a copy of the Complainant’s August 5, 2008 and August 18, 2008 OPRA requests. Ms. Golden also asks Mr. Malloy and Mr. Zuk to inform her immediately as to the amount of information available so she can request a deposit in advance from the Complainant.

September 9, 2009

Memorandum from Mr. Zuk to Ms. Golden. Mr. Zuk states that he has no information responsive to request Item No. 1 of the Complainant’s August 5, 2008 OPRA request, *i.e.*, names of employees who worked from home from January 7, 2007 to the present.

In response to Item No. 2 of the Complainant’s August 5, 2008 OPRA request, *i.e.*, names of employees who have access to the City Internet network and under what circumstances they have been denied access, Mr. Zuk states that any employee who is

⁷ Mr. Coffey makes additional assertions of fact which are not relevant to the adjudication of this Denial of Access Complaint.

⁸ The evidence on record indicates that Mr. Malloy succeeded Mr. Cresci as Business Administrator. Caryl VanBaaren v. City of Bayonne (Hudson), 2009-262 – Findings and Recommendations of the Executive Director

allowed access to the City network has access to the Internet, with the exception of cashier terminals.

In response to request Item No. 3 of the Complainant's August 5, 2008 OPRA request, *i.e.*, names of employees who have access to the City's Internet network and what, if any, sites they can access, Mr. Zuk states that any employee who is allowed access to the City network has access to the Internet, with the exception of cashier terminals. With regard to the portion of Item No. 3 which seeks a listing of Internet sites which can be accessed, Mr. Zuk states that there are certain categories of restricted websites that employees are prohibited to access.⁹

With regard to Item No. 1 of the Complainant's August 18, 2008 OPRA request, *i.e.*, a copy of Mr. Zuk's reply to Ms. Russo's memorandum dated April 17, 2008, Mr. Zuk states that no record responsive exists and with regard to the portion of the Complainant's request which seeks a list of attempts by the Complainant to gain access to websites that were denied, Mr. Zuk states that the only list he is aware of is in the memorandum dated September 29, 2008 from Mr. Coffey.

With regard to Item No. 2 of the Complainant's August 18, 2008 OPRA request, *i.e.*, a list of employees who were required to supply a list of all the internet sites they would have to access from January 7, 2007 to the present, Mr. Zuk states that no record responsive exists.

September 10, 2009

Letter from Ms. Golden to the Complainant. Ms. Golden states that the Complainant should have already received a response to the Complainant's August 5, 2008 and August 18, 2008 OPRA requests. Ms. Golden further states that she is enclosing a copy of a memorandum that she sent to Paul Zuk dated September 9, 2009, as well as the response from him dated September 9, 2009. Ms. Golden further states that, with regard to the \$30.00 fee already paid by the Complainant, the City will advise the Complainant as to the total cost of copies of records responsive to the Complainant's requests and will refund any overpayment to the Complainant.

September 16, 2009

E-mail from Mr. Malloy to Ms. Golden. Mr. Malloy states that in response to request Item No. 1 of the Complainant's OPRA request dated August 5, 2008, seeking names of employees who worked from home from January 7, 2007 to the present, Ms. Ginger Kemp ("Ms. Kemp") was the only employee permitted to work from home. Mr. Malloy also states that Ms. Kemp is no longer employed by the City.

⁹ Mr. Zuk states that the categories of restricted websites include: abortion, adult/mature content, alcohol, alternate sexuality, alternate spirituality belief, auctions, audio/video clips, blogs/personnel pages, brokerage/trading, chat/instant messaging, content services, entertainment, extreme, for kids, games, hacking, humor/jokes, intimate apparel/swimsuit, job search/careers, LGBT, newsgroups/forums, non-viewable, nudity, online storage, open/mixed content, pay-to-surf, pornography, proxy avoidance, remote access tools, restaurants/dining/food, sex education, social networking, society/daily living, software downloads, spyware effects/privacy concerns, spyware/malware sources, suspicious, tobacco, travel, violence/hate/racism, and weapons.

September 17, 2009

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

- Complainant’s first (1st) OPRA request dated August 5, 2008 with attachments;
- Complainant’s second (2nd) OPRA request dated August 18, 2008,¹⁰ with attachments;
- Memorandum from the Custodian to Mr. Cresci dated August 7, 2008;
- Letter from Mr. Cresci to the Complainant dated August 12, 2008;
- Letter from the Complainant to the Custodian dated August 15, 2008;
- Memorandum from the Custodian to Mr. Cresci dated August 21, 2008;
- Letter from the Complainant to the Custodian dated September 2, 2009.¹¹

The Complainant asserts that she never received any responses to her OPRA requests dated August 5, 2008 and August 18, 2008.

The Complainant does not agree to mediate this complaint.

September 17, 2009

Letter from Ms. Golden to the Complainant. Ms. Golden states that she is enclosing a copy of an e-mail which Ms. Golden received from Mr. Malloy dated September 16, 2009 in response to Item No. 1 of the Complainant’s August 5, 2008 OPRA request. Ms. Golden further states that a letter dated September 10, 2009 was previously sent to the Complainant which contained information provided by Mr. Zuk in response to the Complainant’s OPRA requests. Ms. Golden states that this letter and e-mail attachment now completes the information which the Complainant sought.

Ms. Golden also states that she will refund the Complainant the \$30.00 fee paid in August 2008 once Ms. Golden receives a copy of the Complainant’s canceled checks.

October 9, 2009

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

October 20, 2009

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated August 5, 2008;
- Complainant’s second (2nd) OPRA request dated August 18, 2008;¹²
- Memorandum from the Custodian to Mr. Cresci dated August 7, 2008;
- Memorandum from the Custodian to Mr. Cresci dated August 21, 2008;
- Letter from Mr. Coffey to the Complainant dated September 29, 2008;

¹⁰ The evidence of record indicates that the Complainant filed two (2) separate OPRA requests on August 18, 2008; the GRC has consolidated these requests in this adjudication for simplification purposes.

¹¹ The Complainant attached additional materials which are not relevant to the adjudication of this Denial of Access Complaint.

¹² The evidence of record indicates that the Complainant filed two (2) separate OPRA requests on August 18, 2008; the GRC has consolidated these requests in this adjudication for simplification purposes.

- Memorandum from Ms. Golden to Mr. Malloy and Mr. Zuk dated September 9, 2009;
- Letter from Mr. Zuk to Ms. Golden dated September 9, 2009;
- Letter from Ms. Golden to the Complainant dated September 10, 2009;
- E-mail from Mr. Malloy to Ms. Golden dated September 16, 2009;
- Letter from Ms. Golden to the Complainant dated September 17, 2009.

The Custodian certifies that the search to locate the records requested was done by Mr. Zuk and Mr. Cresci. The Custodian also certifies that Mr. Malloy also conducted a search for responsive records. Additionally, the Custodian certifies that Mr. Zuk provided the Complainant with a list of the types of websites that employees are prevented from accessing. The Custodian certifies that Mr. Zuk advised the Custodian that he instructed the Complainant to provide him with a list of websites to which the Complainant needed access.¹³ The Custodian certifies that Mr. Cresci and Mr. Malloy searched the personnel files to determine which City employees were allowed to work from home.

The Custodian certifies that the Complainant submitted one (1) OPRA request dated August 5, 2008 and two (2) separate OPRA requests dated August 18, 2008. The Custodian certifies that he forwarded the Complainant's requests to Mr. Cresci and Mr. Zuk to provide the Custodian with any copies of records responsive to these OPRA requests. The Custodian certifies that he believed that he would be given copies of the records responsive or that Mr. Cresci and Mr. Zuk would provide the Complainant with the records responsive directly. The Custodian further certifies that he believed that the matter was resolved pursuant to a memorandum dated September 29, 2008 from John Coffey to the Complainant. The Custodian certifies that on September 2, 2009, he received a letter from the Complainant, and further certifies that he responded to the Complainant's requests and provided records responsive thereto on September 17, 2009.

The Custodian asserts that the Complainant's request for a list of filtered websites is too large, and further asserts that the request for a list of employees whose access is not filtered would require a large amount of research.

November 5, 2009

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian violated OPRA by failing to respond to her OPRA requests dated August 5, 2008 and August 18, 2008. The Complainant further states that although the Custodian did eventually respond to her OPRA requests on September 10, 2009 and September 17, 2009, such responses do not negate the fact that the City has violated OPRA.

July 28, 2010

E-mail from the GRC to Mr. Zuk. The GRC requests a legal certification stating that there are no records responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request, *i.e.*, names of employees who worked from home from January 7, 2007 to the present and the circumstances thereof, nor are there any records responsive to

¹³ The evidence of record is not clear as to when and how Mr. Zuk so instructed the Complainant.
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request Item No. 1 of the Complainant's August 18, 2008 OPRA request, *i.e.*, a copy of Mr. Zuk's reply to Ms. Russo's memorandum dated April 17, 2008 and nor request Item No. 2, *i.e.*, a list of employees who were required to supply a list of all the internet sites they would have to access from January 7, 2007 to the present, per Mr. Zuk's memorandum dated September 9, 2009.

August 9, 2010

E-mail from Ms. Donna Russo, Esq., ("Ms. Russo") Assistant City Counsel, to the GRC. Ms. Russo confirms a telephone conversation with the GRC stating that Mr. Zuk's legal certification will be submitted by August 16, 2010.

August 24, 2010

E-mail from the GRC to Ms. Russo. The GRC states that it has not yet received the legal certification from Mr. Zuk and informed Ms. Russo to submit the legal certification within three (3) business days.

August 24, 2010

E-mail from Ms. Russo to the GRC. Ms. Russo apologizes for not submitting the legal certification and requests an extension of time until August 27, 2010 to submit same.

September 1, 2010

Legal certification from Mr. Zuk. Mr. Zuk legally certifies that there are no records responsive to the Complainant's OPRA request for Item No. 1 dated August 5, 2008 and for Items No. 1 and No. 2 dated August 18, 2008.

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 states that:

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

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- first page to tenth page, \$0.75 per page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page.”

N.J.S.A. 47:1A-5.b.¹⁴

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.

The GRC first turns to the issue of whether Mr. Cresci properly responded to the Complainant’s OPRA request dated August 5, 2008.

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.

¹⁴ Since the events of this complaint, the copy cost of paper copies provided under OPRA has been amended. The new costs are \$0.05 per letter size page or smaller and \$0.07 per legal size page or larger. Caryl VanBaaren v. City of Bayonne (Hudson), 2009-262 – Findings and Recommendations of the Executive Director

47:1A-5.g.¹⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, Mr. Cresci responded to the Complainant's August 5, 2008 OPRA request on August 12, 2008, the fifth (5th) business day after receipt thereof. The evidence of record indicates that Mr. Cresci neither granted access nor denied access to the requested records; the evidence of record indicates that Mr. Cresci stated that the Complainant's OPRA request did not meet the requirements of the OPRA statute and requested a \$10.00 deposit.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 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 he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) *and* Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Because Mr. Cresci's response to the Complainant's August 5, 2008 OPRA request failed to address each request item and did not provide a lawful basis for a denial of access, Mr. Cresci's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Therefore, although Mr. Cresci responded in writing to the Complainant's August 5, 2008 OPRA request on the fifth (5th) business day following receipt thereof, Mr.

¹⁵ 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.

Cresci's insufficient response to the Complainant's August 5, 2008 OPRA request neither granted access, denied access, sought clarification or requested an extension of time, resulting 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 GRC next addresses the timeliness and sufficiency of Mr. Coffey's response to the Complainant's August 18, 2008 OPRA request.

In the instant complaint, Mr. Coffey responded in writing to the Complainant's August 18, 2008 OPRA request on the twenty-ninth (29th) business day following receipt of such request. Mr. Coffey's response addressed only request Item No. 2 of the August 18, 2008 OPRA request and failed to address request Item No. 1, which sought a copy of Mr. Zuk's reply to Ms. Russo's memorandum dated April 17, 2008.

As previously discussed herein, 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.¹⁶ 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).

Therefore, Mr. Coffey's failure to respond in writing to the Complainant's August 18, 2008 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).

Furthermore, because Mr. Coffey's response to the Complainant's August 18, 2008 OPRA request failed to address each request item and did not provide a lawful basis for a denial, Mr. Coffey's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Now the GRC turns to the lawfulness of the Custodian's denials of access to the requested records.

¹⁶ 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.

In the matter before the Council, the Custodian submitted to the GRC a certification from Mr. Zuk on September 1, 2010 in which Mr. Zuk certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request, nor do records exist which are responsive to request Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request. The Complainant has submitted no evidence to refute Mr. Zuk's certification.

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

Therefore, because Mr. Zuk has certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request and request Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request, and because there is no credible evidence in the record to refute Mr. Zuk's certification, Mr. Zuk 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). N.J.S.A. 47:1A-6.

The GRC next turns to whether request Items No. 2 and No. 3 of the Complainant's August 5, 2008 request are valid under OPRA.

Request Item No. 2 of the Complainant's August 5, 2008 request seeks names of employees who have access to the City's Internet network and under what circumstances they have been denied access to the network, while request Item No. 3 seeks names of employees who have access to the City's Internet network and what, if any, sites they can access.

The Complainant's request Items No. 2 and No. 3 of the August 5, 2008 request are invalid under OPRA because these request items seek information rather than identifiable government 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),¹⁷ 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.”¹⁸ 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 matter before the Council, request Items No. 2 and No. 3 of the Complainant’s August 5, 2008 request seek information, *i.e.* names and circumstances, rather than an identifiable government record. OPRA only operates to make identifiable government records accessible to the public. MAG, *supra*. Therefore, because request Items No. 2 and No. 3 of the Complainant’s August 5, 2008 request seek information and fail to identify specific government records sought, such request Items are invalid under OPRA 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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether Mr. Cresci’s insufficient response to the Complainant’s OPRA request dated August 5, 2008 and Mr. Coffey’s insufficient and delayed response to the Complainant’s OPRA request dated August 18, 2008 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

¹⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁸ As stated in Bent, *supra*.

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 Mr. Cresci violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant’s August 5, 2008 OPRA request, thereby resulting in a deemed denial of said request, and Mr. Coffey violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant August 18, 2008 OPRA request by failing to address each request item and did not provide a lawful basis for a denial and furthermore, Mr. Coffey failed to respond to the Complainant’s August 18, 2008 OPRA request within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., resulting in a deemed denial of said request, Mr. Zuk certified that no records exist which are responsive to request Item No. 1 of the Complainant’s August 5, 2008 OPRA request and Items No. 1 and No. 2 of the Complainant’s August 18, 2008 OPRA request, and the Complainant’s August 5, 2008 request Items No. 2 and No. 3 are invalid under OPRA because these request items seek information rather than a specific identifiable government record, 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 Mr. Cresci and Mr. Coffey’s actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Mr. Cresci's response to the Complainant's failed to address each request item and did not provide a lawful basis for a denial, Mr. Cresci's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2001-272 (May 2008).
2. Although Mr. Cresci responded in writing to the Complainant's August 5, 2008 OPRA request on the fifth (5th) business day following receipt thereof, Mr. Cresci's insufficient response to the Complainant's August 5, 2008 OPRA request neither granted access, denied access, sought clarification or requested an extension of time, resulting 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).
3. Mr. Coffey's failure to respond in writing to the Complainant's OPRA request dated August 18, 2008 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).
4. Because Mr. Coffey's response to the Complainant's failed to address each request item and did not provide a lawful basis for a denial, Mr. Coffey's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2001-272 (May 2008).
5. Because Mr. Zuk has certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request and request Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request, and because there is no credible evidence in the record to refute Mr. Zuk's certification, Mr. Zuk 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). N.J.S.A. 47:1A-6.
6. Because request Items No. 2 and No. 3 of the Complainant's August 5, 2008 request seek information and fail to identify specific government records sought, such request Items are invalid under OPRA 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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

7. Although Mr. Cresci violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant's August 5, 2008 OPRA request, thereby resulting in a deemed denial of said request, and Mr. Coffey violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing an insufficient response to the Complainant August 18, 2008 OPRA request by failing to address each request item and did not provide a lawful basis for a denial and furthermore, Mr. Coffey failed to respond to the Complainant's August 18, 2008 OPRA request within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g., resulting in a deemed denial of said request, Mr. Zuk certified that no records exist which are responsive to request Item No. 1 of the Complainant's August 5, 2008 OPRA request and Items No. 1 and No. 2 of the Complainant's August 18, 2008 OPRA request, and the Complainant's August 5, 2008 request Items No. 2 and No. 3 are invalid under OPRA because these request items seek information rather than a specific identifiable government record, 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 Mr. Cresci and Mr. Coffey's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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Executive Director

January 18, 2011