



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Rahim Caldwell
Complainant

Complaint No. 2009-278

v.

Vineland Board of Education (Cumberland)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 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 the Complainant’s March 16, 2009 request fails to identify any specific time period within which the Custodian could focus his search for the requested bids and because the Complainant’s September 23, 2009 request fails to identify the specific government records sought, the Complainant’s two (2) requests are 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).
2. Pursuant to the Council’s holding in Herron v. Township of Montclair, 2008-46 (April 2009), because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant’s September 23, 2009 request before denying access to said request on the basis that the request would substantially disrupt the Vineland Board of Education’s operations, the Custodian’s response to the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g. Moreover, four (4) OPRA requests in three (3) weeks does not rise to the level of the requests at issue in both Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009), which were voluminous requests spanning multiple items over a substantial number of years and pages. However, the Custodian did not unlawfully deny access to the records requested because said request is invalid under OPRA.



3. Although the Custodian provided an insufficient response to the Complainant's September 23, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Complainant's two (2) requests are 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). 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 29th Day of March, 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: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Rahim Caldwell¹
Complainant**

GRC Complaint No. 2009-278

v.

**Vineland Board of Education (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

March 16, 2009 OPRA request: On-site inspection of records of bids for camera system in the Vineland School District.³

September 23, 2009 OPRA request: On-site inspection of:

1. Records showing how the Complainant's child's records were requested, name of custodian who received the alleged request and records of non-public schools that receive funds.
2. Record showing Federal privacy information act and name of person who forwarded Complainant's child's records to the custodian in question.
3. Records request form used by an unidentified non-public school to obtain the Complainant's child's records from Winslow School.

Request Made: March 16, 2009 and September 23, 2009

Response Made: September 17, 2009 and October 1, 2009

Custodian: Kevin Franchetta

GRC Complaint Filed: October 13, 2009⁴

Background

March 16, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Damon G. Tyner, Esq., of Parker-McCay, P.A. (Atlantic City).

³ The Complainant requested additional records that are not at issue in this complaint.

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

September 17, 2009

Custodian's response to the OPRA request attaching a copy of the "OPRA's 24 Exemptions From Disclosure" printout from the GRC website. The Custodian responds in writing to the Complainant's first (1st) OPRA request on the fifth (5th) business day following receipt of such request.⁵ The Custodian notes on the form that access to the requested records is denied pursuant to OPRA. The Custodian states that OPRA exempts from disclosure:

"... [e]mergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein ... [and] Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software ..." N.J.S.A. 47:1A-1.1.

September 23, 2009

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 1, 2009

Custodian's response to the second (2nd) OPRA request attaching Administrative Law Judge ("ALJ") W. Todd Miller's Initial Decision dated September 3, 2009. The Custodian responds in writing to the Complainant's second (2nd) OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that he is in receipt of the Complainant's September 23, 2009 OPRA request. The Custodian states that over the past few months, the Custodian believes that he has been very accommodating to the Complainant's needs regarding access to government records. The Custodian states that OPRA provides 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." N.J.S.A. 47:1A-5.g.

The Custodian states that because he believes he has made a good faith effort to continually accommodate the Complainant, access to this request is denied because the Complainant's numerous requests have been a substantial disruption to the operations of the Vineland Board of Education ("BOE").

The Custodian states that the Complainant is aware that the matter involving the Complainant's child was already brought before the Office of Administrative Law ("OAL"). The Custodian states that the attached Initial Decision directed the Complainant to address his concerns with the Superior Court of New Jersey, Family

⁵ The evidence of record indicates that although the Complainant's OPRA request is dated March 16, 2009, the Custodian received the Complainant's OPRA request on September 10, 2009. *See* Complainant's March 16, 2009 OPRA request with the Vineland Board of Education's date stamp thereon. *Rahim Caldwell v. Vineland Board of Education (Cumberland), 2009-278 – Findings and Recommendations of the Executive Director*

Division. The Custodian states that any future requests should be directed to the Custodian's Counsel.

October 13, 2009

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

- Complainant's first (1st) OPRA request dated March 16, 2009 with the BOE's date stamp and Custodian's response thereon.
- Complainant's second (2nd) OPRA request dated September 23, 2009.
- Letter from the Custodian to the Complainant dated October 1, 2009 attaching ALJ W. Todd Miller's Initial Decision dated September 3, 2009.

Complainant's OPRA request dated March 16, 2009:

The Complainant alleges that he submitted his first (1st) OPRA request to the BOE on March 16, 2009. The Complainant states that the Custodian responded in writing on September 10, 2009⁶ denying access to the requested bids pursuant to OPRA.

Complainant's OPRA request dated September 23, 2009:

The Complainant states that he submitted a second (2nd) OPRA request to the BOE on September 23, 2009. The Complainant states that the Custodian responded in writing on October 1, 2009 denying access to the Complainant's request and stating that the Complainant's numerous OPRA requests had substantially disrupted agency operations at the BOE.

The Complainant does not agree to mediate this complaint.

November 10, 2009

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

November 24, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the requested SOI.

November 24, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until December 4, 2009 to submit the requested SOI.

December 1, 2009

Custodian's SOI with the following attachments:

⁶ The Complainant appears to have identified the response date as September 10, 2009 based on the BOE's date stamp. The evidence of record indicates that the Custodian actually responded in writing to the Complainant on September 17, 2009.

- Complainant's first (1st) OPRA request dated March 16, 2009 with the BOE's date stamp and Custodian's response thereon.
- "OPRA's 24 Exemptions From Disclosure" printout from the GRC website.
- Complainant's second (2nd) OPRA request dated September 23, 2009.
- Letter from the Custodian to the Complainant dated October 1, 2009 attaching ALJ W. Todd Miller's Initial Decision dated September 3, 2009.⁷

The Custodian certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable in this complaint.⁸

Complainant's OPRA request dated March 16, 2009:

The Custodian certifies that he received the Complainant's first (1st) OPRA request on September 10, 2009. The Custodian certifies that he responded in writing to such request on September 17, 2009 noting on the form that access to the requested bid records is denied pursuant to OPRA. The Custodian certifies that he attached a copy of the "OPRA's 24 Exemptions From Disclosure" printout from the GRC website highlighting the relevant exemptions.

Complainant's OPRA request dated September 23, 2009:

The Custodian certifies that he received the Complainant's second (2nd) OPRA request on September 23, 2009. The Custodian certifies that he responded in writing on October 1, 2009 denying access to the Complainant's request citing a substantial disruption of agency operations. N.J.S.A. 47:1A-5.g.

The Custodian certifies that the BOE does not maintain "chain of custody" records that appear to be responsive to the Complainant's second (2nd) request, but that the parental request to release records would be in the student's permanent file. Moreover, the Custodian certifies that the private school the Complainant's child now attends refused to participate in the "NCLB" application and therefore does not receive Federal funds from the BOE.

The Custodian states that the Complainant began filing OPRA requests with the BOE on January 7, 2009. The Custodian states that on or about September 1, 2009, the Complainant filed a petition for emergent relief with the New Jersey Department of Education ("DOE") on behalf of the Complainant's child. The Custodian states that the matter was heard by ALJ Miller on September 3, 2009 and the motion was subsequently denied. The Custodian states that the Complainant then filed three (3) OPRA requests the following week: all were fulfilled. The Custodian certifies that this OPRA request was the fourth (4th) request forwarded to the BOE in less than three (3) weeks after the ALJ Miller's Initial Decision of September 3, 2009.

⁷ The Custodian attached additional records that were provided to the Complainant in response to the additional request items not at issue in this complaint.

⁸ The Custodian did not certify to the search undertaken.

The Custodian contends that the volume and nature of the Complainant's OPRA requests were creating a substantial disruption of agency operations, thus his request was denied accordingly. See N.J.S.A. 47:1A-5.g.

Analysis

Whether the Complainant's two (2) OPRA requests are valid requests under OPRA?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant's March 16, 2009 request sought "[o]n-site inspection of records of bids for camera systems in the [BOE]." The Complainant's September 23, 2009 request sought on-site inspection of records "... showing how the Complainant's child's records were requested, name of custodian who received the alleged request and records of non-public schools that receive funds ... showing Federal privacy information act and name of person who forwarded Complainant's child's records to the custodian in question [and] request form used by an unidentified non-public school to obtain the Complainant's child's records from Winslow School."

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),⁹ 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."¹⁰

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 Complainant's March 16, 2009 request identifies a type of government record but fails to indicate any time period within which the Custodian could focus his search. Further, the Complainant's September 23, 2009 request fails to identify specific government records sought; rather, said request seeks a combination of information and general records "... showing how the Complainant's child's records were requested, name of custodian who received the alleged request and

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

records of non-public schools that receive funds ... showing Federal privacy information act and name of person who forwarded Complainant's child's records to the custodian in question [and] request form used by an unidentified non-public school to obtain the Complainant's child's records from Winslow School." OPRA does not countenance an open-ended search of a public agency's files. MAG, *supra*, at 549.

Therefore, because the Complainant's March 16, 2009 request fails to identify any specific time period within which the Custodian could focus his search for the requested bids and because the Complainant's September 23, 2009 request fails to identify the specific government records sought, the Complainant's two (2) requests are invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, NJ Builders *supra*, and Schuler, *supra*.

The GRC notes that there is no need to address whether the Custodian lawfully denied access to the bids sought in the Complainant's March 16, 2009 request because said request is invalid under OPRA.

Whether the Complainant's September 23, 2009 request caused a substantial disruption of the Vineland Board of Education's operations?

OPRA provides 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.*" (Emphasis added). N.J.S.A. 47:1A-5.g.

The Custodian responded in writing to the Complainant's second (2nd) request on October 1, 2009 stating that over the past few months, the Custodian believes that he has been very accommodating to the Complainant's needs regarding access to government records. The Custodian further stated that access to said request is denied pursuant to N.J.S.A. 47:1A-5.g. because the Complainant's numerous requests have been a substantial disruption to the operations of the BOE.

In the SOI, the Custodian certified that the Complainant began filing OPRA requests with the BOE on January 7, 2009. Further, the Custodian certified that following ALJ Miller's Initial Decision dated September 3, 2009,¹¹ the Complainant filed three (3) OPRA requests the following week: all were fulfilled. The Custodian certifies that this OPRA request was the fourth (4th) request forwarded to the BOE in less than three (3) weeks after the ALJ Miller's Initial Decision of September 3, 2009. The Custodian contended that the volume and nature of the Complainant's OPRA requests created a substantial disruption of agency operations, thus his request was denied accordingly. *See* N.J.S.A. 47:1A-5.g.

¹¹ On or about September 1, 2009, the Complainant filed a petition for emergent relief with DOE on behalf of the Complainant's child. The matter was heard by ALJ Miller on September 3, 2009 and the motion was subsequently denied.

The GRC has previously ruled on several complaints in which custodians have asserted that responding to an OPRA request would create a substantial disruption of agency operations.

Regarding a voluminous records request in Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the GRC ruled that based on the custodian's certification that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial disruption to the agency's operations, and the custodian's efforts to reach a "reasonable solution" with the complainant that accommodates the interests of the requestor and the agency, and the voluminous nature of the complainant's request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i.

Moreover, in Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), the complainant's seven (7) page, fifty-nine (59) item request sought access to voluminous records from the Borough of Stanhope. The custodian responded in writing to the complainant within seven (7) business days of receiving the request and advised the complainant that the custodian required additional time to respond to the voluminous OPRA request. The custodian advised the complainant that she could not reasonably keep up with his ongoing submission of OPRA requests without substantially disrupting the functioning of her office. The custodian attempted to reach a mutually agreeable solution to balance the complainant's right to access to government records with the custodian's need to manage her job responsibilities without substantial disruption.

The GRC held that, based on the custodian's certification that granting access to the voluminous records requested by the complainant in his seven (7) page, fifty-nine (59) item request spanning over twelve (12) years, would result in a substantial disruption to the agency's operations, the custodian's efforts to reach a reasonable solution with the complainant that accommodated the interests of the requestor and the agency, and the voluminous nature of the complainant's OPRA request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i and consistent with the GRC's decision in Vessio, supra, and New Jersey Builders Association v. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

In Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009), the complainant submitted a fifty (50) page OPRA request to the custodian on December 3, 2007. The custodian responded in writing in a timely manner noting that the complainant's OPRA request was voluminous and fulfilling it would substantially disrupt the operations of this agency. The custodian further stated in the SOI that as an attempt to accommodate the complainant's OPRA request, the custodian requested the complainant to narrow his request or provide an alternative suggestion for resolving the matter. However, the complainant's responses to the custodian's attempts to accommodate the complainant's OPRA request were vague and failed to narrow the scope of the complainant's OPRA request to a more manageable scale. The GRC determined that:

“... because in the Custodian’s timely response to the Complainant’s OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant’s voluminous request which would substantially disrupt the agency’s operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant’s OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5.g., New Jersey Builders Association v. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007) and Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007).” *Id.* at page 8.

Conversely, in Herron v. Township of Montclair, 2008-46 (April 2009), the complainant requested a list of the total number of juveniles arrested in the last twelve (12) months organized by race, gender, and offense, and a list of the total number of juveniles sent to Essex County Youth Facility organized by race, gender, and offense. The custodian responded in writing to the complainant’s OPRA request on the seventh (7th) business day following receipt of such request stating that 178 juveniles were arrested in Montclair and 32 were sent to the Essex County Youth Facility during the year 2007. The custodian further stated that she would have to research every report to find the race, gender, and offense of each juvenile. Thus, the custodian denied the Complainant access to the requested records stating that fulfilling the request would substantially disrupt the operation of the agency pursuant to N.J.S.A. 47:1A-5.g.

In analyzing the facts of Herron, *supra*, the Council reasoned that:

“[a]lthough OPRA permits a custodian to deny access to a records request on the basis that fulfilling the request would substantially disrupt agency operations, OPRA requires that *the custodian must first attempt to reach a reasonable accommodation* of the request with the requestor before denying access. N.J.S.A. 47:1A-5. See Vessio v. NJ Department of Community Affairs, 2007-63 (May 2007)(holding that the custodian must attempt to reach a reasonable accommodation before denying access based on substantial disruption of agency operation).” (Emphasis added.) *Id.* at page 3-4.

The Council determined that although the custodian asserted that responding to the request would cause a substantial disruption of agency operations, the custodian failed to show that she attempted to reach a reasonable accommodation of the request with the complainant. The Council thus held that:

“... because the Custodian failed to attempt a reasonable accommodation of the Complainant’s OPRA request before denying access to the requested records on the basis that the request would substantially disrupt

the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g." *Id.*

The facts of the instant complaint are similar to the facts of Herron, *supra*. Specifically, the Custodian here denied access to the records responsive to the Complainant's second (2nd) request pursuant to N.J.S.A. 47:1A-5.g. because the Complainant's numerous requests have resulted in a substantial disruption to the operations of the BOE. Although the Custodian argues in the SOI that that the Complainant had filed four (4) OPRA requests in a three (3) week period, the Custodian failed to attempt a reasonable accommodation of the request at issue prior to the denial of access. Moreover, four (4) OPRA requests in three (3) weeks does not rise to the level of the requests at issue in both Vessio, *supra*, Caggiano, *supra*, and Dittrich, *supra*, which were voluminous requests spanning multiple items over a substantial number of years and pages.

Therefore, pursuant to the Council's holding in Herron, *supra*, because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's September 23, 2009 request before denying access to said request on the basis that the request would substantially disrupt the BOE's operations, the Custodian's response to the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g. Moreover, four (4) OPRA requests in three (3) weeks does not rise to the level of the requests at issue in both Vessio, *supra*, Caggiano, *supra*, and Dittrich, *supra*, which were voluminous requests spanning multiple items over a substantial number of years and pages. However, the Custodian did not unlawfully deny access to the records requested because said request is invalid under OPRA.

Whether the Custodian's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian provided an insufficient response to the Complainant's September 23, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Complainant's two (2) requests are invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, NJ Builders supra, and Schuler, *supra*. 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. Because the Complainant's March 16, 2009 request fails to identify any specific time period within which the Custodian could focus his search for the requested bids and because the Complainant's September 23, 2009 request fails to identify the specific government records sought, the Complainant's two (2) requests are 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).
2. Pursuant to the Council's holding in Herron v. Township of Montclair, 2008-46 (April 2009), because the Custodian failed to attempt to reach a reasonable accommodation of the Complainant's September 23, 2009 request before denying access to said request on the basis that the request would substantially disrupt the Vineland Board of Education's operations, the Custodian's response to the request is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g. Moreover, four (4) OPRA requests in three (3) weeks does not rise to the level of the requests at issue in both Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63

(May 2007), Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009), which were voluminous requests spanning multiple items over a substantial number of years and pages. However, the Custodian did not unlawfully deny access to the records requested because said request is invalid under OPRA.

3. Although the Custodian provided an insufficient response to the Complainant's September 23, 2009 request pursuant to N.J.S.A. 47:1A-5.g., the Complainant's two (2) requests are 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). 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

March 22, 2011