



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 28, 2011 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2009-313

v.

Township of Livingston (Essex)
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 *Reconsideration* 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 because the Complainant has failed to establish in his motion for reconsideration of the Council’s February 24, 2011 Final Decision that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 28th Day of June, 2011



Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 12, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting

Larry A. Kohn¹
Complainant

GRC Complaint No. 2009-313

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Budget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).
2. Backup and material that supports March 23, 2009 public statement at the Council meeting that construction for the Library cost \$11,335,256.³

Request Made: October 8, 2009

Response Made: October 14, 2009

Custodian: Glenn Turteltaub

GRC Complaint Filed: November 24, 2009⁴

Background

February 24, 2011

Government Records Council's ("Council") Interim Order. At its February 24, 2011 public meeting, the Council considered the February 15, 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, found that:

1. Because the Complainant identifies a type of government record (audit trail) for a specific account (Emergency Dispatch Communication Center C-4-55-009-015-009), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant's request Item No. 1 seeking a "[b]udget account

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

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.

status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).” The Custodian’s search does not require research, but rather requires the Custodian to provide the audit trail for the specific account number listed. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial to the Complainant’s OPRA request Item No. 1. However, the GRC declines to order disclosure of the requested audit trail because the record was provided to the Complainant as part of the Statement of Information.

2. Because the Complainant’s request Item No. 2 fails to identify specific government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, the Complainant’s request Item No. 2 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant’s OPRA request Item No. 1 pursuant to N.J.S.A. 47:1A-6, the Custodian did provide access to the requested audit trail as part of the Statement of Information and the Complainant’s request Item No. 2 is not a valid OPRA request. 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.

March 1, 2011

Council’s Final Decision distributed to the parties.

March 14, 2011

Complainant’s request for reconsideration. The Complainant requests that the Council reconsider its February 24, 2011 Final Decision pursuant to *N.J.A.C. 5:105-2.10* based on a mistake.

The Complainant takes issue with the Council’s first (1st) conclusion. The Complainant states that the Custodian is very familiar with audit trails similar to the one at issue in this complaint. The Complainant states that he has requested audit trails in the past and received same without any difficulty. The Complainant notes that the Council correctly noted that the Custodian provided a copy of the responsive audit trail as part of the Statement of Information (“SOF”).

The Complainant argues that he believes the Council failed to place any weight on the fact that the Custodian had no difficulty producing the audit trail with the SOI but could not provide access to same at the time of the Complainant's OPRA request. The Complainant argues that OPRA is not a two-step process: the Complainant would not have received the requested audit trail without filing a Denial of Access Complaint.

The Complainant believes that the Custodian knowingly blocked access to the record; however, the Council was too quick to conclude that the Custodian's actions did not rise to a level of a knowing and willful violation of OPRA. The Complainant asserts that although the Council stated that the Custodian failed to bear his burden of proving a lawful denial of access to the requested audit trail, the failure signals to the Custodian that he can continue to impede access to similar records in the future.

The Complainant also takes issue with the Council's second (2nd) conclusion. The Complainant argues that the Council was too quick to conclude that the Complainant's request Item No. 2 required research. The Complainant asserts that he clearly identified the date of the meeting, subject matter of the requested records and who was in possession of those records. The Complainant asserts that the exact dollar amount was also referenced. The Complainant argues that rather than conducting research, the Custodian simply had to ask the Township Manager to produce the records she referenced when the total amount spent on the Library project was announced at the March 23, 2009 public meeting.

The Complainant asserts that OPRA was intended to create a more informed citizenry that has the ability to hold elected officials accountable for their actions. The Complainant argues that his request was very simple and that both the Custodian and Township officials know exactly what records were sought. The Complainant argues that the Council's conclusion relieves the Township from their burden of proving how much money was spent on the Library construction project. The Complainant argues that the purpose of OPRA was not satisfied in this complaint solely because the Council quickly decided that the Complainant's request Item No. 2 was overly broad and required research. The Complainant asserts that the Council's conclusion on the basis of the facts was wrong.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's February 24, 2011 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Final Decision dated February 24, 2011 on March 14, 2011, nine (9) business days from the issuance of the Council's Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Complainant submitted arguments regarding why he disagreed with the Council's February 24, 2011 Final Decision. With regard to Item No. 1 of the Council's Final Decision, the Complainant argues that the GRC failed to place weight on the fact that the Custodian could so easily produce the responsive audit trail as part of the SOI, but not initially provide access to the Complainant. The Complainant argued the Custodian's actions amounted to a two (2) step process by which the Complainant would not have received the requested audit trail had he not filed this complaint. The Complainant argued that although the Council acknowledges that the Custodian failed to bear his burden of proving a lawful denial of access, the Council's decision that the Custodian did not knowingly and willfully violate OPRA only signals to the Custodian that he can similarly impede access to audit trails in the future.

With regard to Item No. 2 of the Council's February 24, 2011 Final Decision, the Complainant argued that the Council too quickly discounted the Complainant's request Item No. 2 as overly broad. The Complainant argued that the request item identified qualifiers including the meeting date, person in possession of the records and exact dollar amount. The Complainant argued that the request did not require research: the Custodian had to simply ask the Township Manager to produce the records she referenced when the total amount spent on the Library project was announced at the March 23, 2009 public meeting.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a

"palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to submit any new evidence in support of his motion. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint. See D'Atria, *supra*. Notably, the Complainant's arguments indicate that he was merely dissatisfied with the Council's holdings in the instant complaint, not that the Council's Final Decision was based upon a palpably incorrect or irrational basis or that the Council did not consider or failed to appreciate the significance of probative, competent evidence.

The Council's Final Decision is supported by substantial evidence in the case as well as based on established case law. The Custodian's response to request Item No. 1 was based on a prior Council holding that a time frame was necessary in appropriately requesting resolutions or meeting minutes. See Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-324 (June 2009). The Council clearly differentiated the facts of that complaint from the instant matter, holding that request Item No. 1 at issue here sought a specific government record. Although the Custodian may have erroneously applied the facts of Kohn, *supra* to the instant complaint, his actions hardly rose to the standard of a knowing and willful violation. Moreover, the Council's holding does not reinforce the Custodian's ability to withhold similar records in the future; to the contrary, the Council's holding clearly reinforces that this type of request is not overly broad.

The opposite can be said regarding the request Item No. 2, which the Council held to be invalid because the Complainant failed to identify specific government records sought. In comparing request Item No. 1 to request Item 2, the Council's decision becomes clear. The Complainant's request Item No. 1 identifies an audit trail by specific account number. The Complainant's request Item No. 2 for "[b]ackup and material..." relating to a comment made at a public meeting could encompass any type of government record. Simply put, a public official could have utilized several different types of records in making a statement, each not necessarily referring directly to the bottom line cost for a project, etc.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council's February 24, 2011 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's

February 24, 2011 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 21, 2011



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

February 24, 2011 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2009-313

v.

Township of Livingston (Essex)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 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 identifies a type of government record (audit trail) for a specific account (Emergency Dispatch Communication Center C-4-55-009-015-009), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant’s request Item No. 1 seeking a “[b]udget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).” The Custodian’s search does not require research, but rather requires the Custodian to provide the audit trail for the specific account number listed. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial to the Complainant’s OPRA request Item No. 1. However, the GRC declines to order disclosure of the requested audit trail because the record was provided to the Complainant as part of the Statement of Information.
2. Because the Complainant’s request Item No. 2 fails to identify specific government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, the Complainant’s request Item No. 2 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).



3. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's OPRA request Item No. 1 pursuant to N.J.S.A. 47:1A-6, the Custodian did provide access to the requested audit trail as part of the Statement of Information and the Complainant's request Item No. 2 is not a valid OPRA request. 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 February, 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: March 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Larry A. Kohn¹
Complainant

GRC Complaint No. 2009-313

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Budget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).
2. Backup and material that supports March 23, 2009 public statement at the Council meeting that construction for the Library cost \$11,335,256.³

Request Made: October 8, 2009

Response Made: October 14, 2009

Custodian: Glenn Turtletaub

GRC Complaint Filed: November 24, 2009⁴

Background

October 8, 2009

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

October 14, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that request Item No. 1 fails to identify a specific time period within which the records would fall. The Custodian states that according to the GRC's website, "[i]n order to be considered a valid request under OPRA, the request must identify the specific record(s) desired..."

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

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.

Additionally, the Custodian states that request Item No. 2 fails to identify the specific government records sought. The Custodian directs the Complainant to the quote from the GRC's website.

October 19, 2009

Letter from the Complainant to the Custodian. The Complainant states that he believes both request items satisfy the requirements of a valid OPRA request.

The Complainant states that request Item No. 1 does not need dates because the requested document cannot predate the approval of the appropriation nor can it include entries for future dates. The Complainant states that identifying a time frame could require modification of the requested record. The Complainant states that he anticipates reviewing the requested records in their entirety from the inception date through the current date.

The Complainant further states that request Item No. 2 contains a specific date, content, conclusion and source.

November 6, 2009

Letter from the Complainant to the Custodian. The Complainant states that on this day, he went to the Township offices to review the requested records. The Complainant states that he was shown no records responsive to his OPRA request. The Complainant states that he provided clarification of his request on October 19, 2009.

November 24, 2009

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

- Complainant's OPRA request dated October 8, 2009.
- Letter from the Custodian to the Complainant dated October 14, 2009.
- Letter from the Complainant to the Custodian dated October 19, 2009.
- Letter from the Complainant to the Custodian dated November 6, 2009.

The Complainant states that he submitted an OPRA request to the Township on October 8, 2009. The Complainant states that the Custodian responded on October 14, 2009 denying access to both request items and stating that the request items failed to specify the time period and identifiable government records respectively. The Complainant states that he provided clarification of both requests on October 19, 2009 yet received no further correspondence regarding the OPRA request. The Complainant states that he sent a letter to the Custodian on November 6, 2009 noting that no records responsive to the request at issue were provided.

The Complainant contends that the Custodian's failure to provide a response to the Complainant's October 19, 2009 and November 6, 2009 letters results in an unlawful denial of access, thus the Custodian has violated OPRA. The Complainant argues that he considers this failure to respond to be evidence that the Custodian has no intention of complying with the Complainant's OPRA request.

The Complainant does not agree to mediate this complaint.

December 17, 2009

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

December 22, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until January 5, 2010 to provide the requested SOI.

December 24, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until January 5, 2010 to provide the requested SOI.

January 7, 2010⁵

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 8, 2009.
- Letter from the Custodian to the Complainant dated October 14, 2009.
- C-04-55-009-015-009 between January 1, 2009 and December 22, 2009.

The Custodian certifies that the last date upon which 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.⁶

The Custodian certifies that he received the Complainant’s OPRA request on October 8, 2009.

Request Item No. 1: Audit Trail for \$1,200,000 capital appropriation:

The Custodian certifies that he responded in writing to the Complainant on October 14, 2009 stating that this request was invalid under OPRA because it failed to identify a time period within which the requested record would fall.

The Custodian argues that because the Complainant’s request item was invalid, the Custodian’s denial was proper. The Custodian states that in Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-324 (June 2009), the Council held that:

“[a]lthough the Complainant identified specific records in his December 4, 2007 OPRA request, *the requests failed to specify the dates of particular resolutions or meeting minutes sought*; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant’s request is invalid under OPRA and *the Custodian has not unlawfully denied access to the requested records pursuant to MAG*

⁵ The Custodian notes in the cover letter accompanying the SOI that said SOI was returned by the Post Office for insufficient postage in the amount of \$0.44.

⁶ The Custodian did not certify to the search undertaken.

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 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).” (Emphasis added.) *Id.* at pg. 7.

Moreover, the Custodian states that the “Handbook for Records Custodians” (Third Edition, October 2009) provides that:

“[a] custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request. A custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad and unclear OPRA request.” *Id.* at pg. 17.

The Custodian argues that although the Complainant may claim his October 19, 2009 correspondence was an attempt to clarify the request, this correspondence does little more than refute the Custodian’s denial by providing some legal analysis.

Moreover, the Custodian certifies that to be absolutely clear, a document similar to the one sought by the Complainant did not exist at the time of the Complainant’s request because the Township does not print out nor run such a printout in the course of normal business. The Custodian certifies that the record sought by the Complainant does not exist unless and until the Township runs it. The Custodian further certifies that without a specific start and end date, the Township could not produce a report without additional research.

The Custodian asserts that the Township has gone above and beyond what is required under OPRA and created a record which it believes may be responsive to the Complainant’s request. The Custodian asserts that the Township has taken this step solely for the purpose of a quick resolution to this matter. The Custodian certifies that said record is attached to the SOI, which is being provided to the Complainant.

Request Item No. 2: Backup and material supporting cost statement by Council:

The Custodian certifies that he responded in writing to the Complainant on October 14, 2009 stating that this request was invalid under OPRA because it failed to identify a specific government record sought.

The Custodian argues that this request item fails to seek a specific identifiable government record but rather seeks information; thus, said request is invalid under OPRA. The Custodian asserts that because the request was invalid, the Custodian was under no obligation to conduct research to locate records that may be responsive. The Custodian asserts that even attempting to satisfy this request item would involve, at the

very least, questioning the Mayor about his thought process regarding making statements in a public meeting.

The Custodian argues that for the foregoing reasons, he advised the Complainant that this request item was invalid. The Custodian asserts that the Complainant's October 19, 2009 letter provided little more than a counter-argument and not clarification. The Custodian asserts that the Complainant has erred in describing his October 19, 2009 letter as clarification of this request item.

The Custodian contends that a custodian of record under OPRA is not required to conduct research in order to provide information in responses to questions. The Custodian states that the New Jersey Superior Court has held that:

*"OPRA ... 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.*

The Custodian states that in Piszar v. Township of Milburn (Essex), GRC Complaint No. 2006-196 (July 2008), the Council held that:

"[f]urther, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ 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.'¹¹

Additionally, the court in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) 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...'⁸

Therefore, because the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

Complainant's request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra and NJ Builders, supra." *Id.* at pg. 6.

The Custodian asserts that OPRA imposes no obligation on the Mayor to explain his statements nor is the Custodian required to obtain answers to questions.

The Custodian contends that because both of the Complainant's request items fail to specifically identify government records, both request items are invalid under OPRA and the Custodian has not unlawfully denied access to same. *See Lopez v. New Jersey Department of Corrections*, GRC Complaint No. 2008-250 (November 2009).

January 11, 2010

The Complainant's response to the Custodian's SOI. The Complainant contends that the record sought in request Item No. 1 is not a date specific record. The Complainant asserts that based on this fact, a comparison to a request for minutes that fails to identify the specific date of the meeting(s) is not applicable in this matter. The Complainant asserts that the record contains the term "trail," which would suggest that it covers a period of time. The Complainant argues that the initial request contained sufficient information to identify the record being sought. The Complainant notes that the request item clearly identified that a budget account audit trail for a specific account number was being requested and that the Complainant's October 19, 2009 letter clarifies why no date is necessary.

The Complainant asserts that with respect to the Custodian's position that no record responsive exists, this position is not a valid reason to deny access to a record.⁹ The Complainant states that OPRA defines a government record as "any paper ... microfilm, data processed or image processed document, information stored or maintained electronically ..." N.J.S.A. 47:1A-1.1. The Complainant asserts that by upholding the Custodian's position, the GRC would essentially be allowing custodians to deny any OPRA requests for records maintained electronically on the basis that no records exist, which is inapposite to the definition of a government record under OPRA. Further, the Complainant avers that the audit trail provided as part of the SOI proves that the record existed at the time of the Complainant's OPRA request as the appropriation was recorded on April 7, 2009.

The Complainant asserts that in regard to request Item No. 2, the Custodian appears to be using the terms "documents" and "information" as separate things. The Complainant asserts that he does not comprehend the Custodian's position that the request item sought information in response to a question.

The Complainant asserts that the information requested can exist in two (2) potential forms. First, the Complainant asserts that the information might exist in the mind of the Mayor as suggested by the Custodian. The Complainant contends that if this is true, it can be assumed that the Mayor's statement at the public meeting was unsupported and a best guess. The Complainant states that if this is the Township's

⁹ The Complainant notes that the Custodian never claimed that the record didn't exist in his initial response. *Larry A. Kohn v. Township of Livingston (Essex), 2009-313 – Findings and Recommendations of the Executive Director*

position and the information cannot be produced then the Complainant will accept this position.

Second, the Complainant asserts that the other potential form is that documents exist that would support the final amount of \$11,335,256. The Complainant asserts that since the Township Manager, with papers in hand, conferred with the Mayor prior to his comment at the public meeting in question, the Complainant assumed that a document existed which contained the information sought. The Complainant states that he believes that request Item No. 2 contained sufficient information to locate the requested record(s). The Complainant notes that until public agencies list and identify all types of records maintained, the public will be forced to attempt to provide the best possible description for a record. The Complainant asserts that in this complaint, he was forced to fashion his request with a series of qualifiers because he did not know the exact title of the record sought.¹⁰

Additionally, the Complainant argues that not all requests that begin with “any and all” are overly broad or unclear. The Complainant notes that if a requestor identifies a type of government record that falls within a specific time frame, such request is valid. *See Driscoll v. School District of the Chathams (Morris)*, GRC Complaint No. 2007-300-303 (June 2008). The Complainant states that a custodian is also required to search his/her files to find identifiable government records. The Complainant avers that only in the instance where an OPRA request is invalid does the custodian not have an obligation to research his/her files to figure out which records, if any, are responsive to an OPRA request. *See Donato v. Township of Union*, GRC Complaint No. 2005-182 (February 2007).

In closing, the Complainant argues that his OPRA request was not overly broad or unclear and that the Custodian had an obligation to search his files to locate those records responsive. The Complainant notes that the Custodian failed to address the search undertaken in the SOI; instead, the Custodian concluded that the request was too broad to conduct any search.

November 10, 2010

Letter from the Complainant to the GRC. The Complainant reiterates that he believes that audit trail responsive to request Item No. 1 is not a date specific document in the sense that a requestor must identify a specific time period when requesting same. The Complainant states that by definition, audit trails begin on the date the appropriation is authorized and records all transactions that occurred up to the date of the OPRA request. The Complainant states that he has in the past submitted OPRA requests worded virtually the same as request Item No. 1 and was never denied access based on the absence of a specific time frame.

The Complainant contends that the Custodian’s position that the audit trail did not exist because it was not printed out is inconsistent with the definition of a government record under OPRA, which includes “... information stored or maintained electronically

¹⁰ The Complainant notes that the Township previously provided information on this issue that reflected a significantly lower cost based on inaccuracies. The Complainant asserts that he believes this denial of access was based on the Township’s desire to keep detailed information away from the public.

...” N.J.S.A. 47:1A-1.1. The Complainant states that the Custodian had no difficulty identifying the audit trail requested when attaching same to the SOI.

The Complainant asserts that the following analogy might be instructive in regards to the Custodian’s handling of request Item No. 2. The Complainant states that if at a public meeting a municipal official stated that the municipality was involved in litigation, a member of the public may want to obtain additional information on said litigation. The Complainant states that it is reasonable to assume that the litigation is specific as to the parties, dates of filing, jurisdiction in which the complaint was filed, docket number, and so on. The Complainant questions whether the Custodian’s position in this instance would be to deem an OPRA request invalid because the requestor failed to provide all of the indentifying information.

The Complainant asserts that it is his belief that the Custodian, who attends all public meetings, knew exactly what records were responsive to request Item No. 2 and failed to perform an adequate search to locate same.

The Complainant asserts that based on the foregoing, he believes that the Custodian knowingly and willfully denied access to the requested records.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all

records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Complainant’s request Item No. 1: Audit Trail No. C-04-55-009-015-009:

The Custodian responded in writing to the Complainant’s request Item No. 1 on the third (3rd) business day after receipt of said request stating that it failed to specify the specific time period within which the audit trail would fall. The Complainant responded on October 19, 2009 stating that a time frame is not required because the audit trail can not predate the approval date of the appropriation nor can it include dates beyond the date of the OPRA request. The Complainant filed a Denial of Access Complaint after not receiving the requested audit trail.

The Custodian argued in the SOI that the Complainant’s request Item No. 1 was invalid because it failed to identify a specific time frame and cited to Kohn v. Township of Livingston (Essex), GRC Complaint No. 2007-324 (June 2009). The Custodian argued that the “Handbook for Records Custodians” (Third Edition, October 2009) states that custodians are only obligated to search their records and not conduct research. The Custodian contended that although the Complainant asserts that he clarified the request item on October 19, 2009, this clarification was no more than a legal analysis of why the request item was valid.

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),¹¹ 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.”¹²

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

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

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).”

The Complainant’s request Item No. 1 sought a “[b]udget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).” The Custodian cited to the Council’s decision in Kohn, supra; however, the facts of that complaint are inapposite to the facts here.

Specifically, the complainant in Kohn, supra, requested copies “... of a Request for Proposal (“RFP”) for Municipal Township Auditor, replies, minutes of meeting, and decision to reject Request for Proposal (“RFP”).” There, the Council reasoned that “said requests also fail to specify the dates of particular minutes and therefore require the Custodian to research which minutes and/or agendas relate to authorizations and instructions by the Township attorney identified in the Complainant’s OPRA requests.” *Id.* at pg. 6. Here, the Complainant requested a specific record (audit trail) and identified a specific value (\$1,200,000.00) for a specific account (Emergency dispatch Communication Center, C-4-55-009-015-009). Further, the audit trail provided as part of the SOI supports the Complainant’s argument that no specific dates would be needed in order to locate the trail.

Therefore, because the Complainant identifies a type of government record (audit trail) for a specific account (Emergency Dispatch Communication Center C-4-55-009-015-009), MAG, supra, and Bent, supra, do not apply to the Complainant’s request Item No. 1 seeking a “[b]udget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).” The Custodian’s search does not require research, but rather requires the Custodian to provide the audit trail for the specific account number listed. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial to the Complainant’s OPRA request Item No. 1. However, the GRC declines to order disclosure of the requested audit trail because the record was provided to the Complainant as part of the SOI.

The GRC notes that the Custodian’s assertion that the audit trail responsive did not exist at the time of the Complainant’s OPRA request Item No. 1 because the

Township did not print out the audit trail in the course of government business is erroneous.

The Custodian essentially argues that any record held electronically does not constitute a government record. As the Complainant noted in his letter to the GRC dated November 10, 2010, 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.

The Custodian’s argument that the requested audit trail “did not exist” because it had not been printed out is erroneous because the argument is similar to a custodian arguing that e-mails maintained on a public official’s hard drive are not considered government records until printed out and kept in hardcopy. Moreover, the argument is errant on its face based on the definition of a government record as set forth in OPRA, which provides that electronically stored information “made, maintained or kept on file ... in the course of ... official business” is a government record. N.J.S.A. 47:1A-1.1.

Complainant’s OPRA request Item No. 2: Backup supporting Mayor and Council’s March 23, 2009 public meeting comments:

The Complainant’s request Item No. 2 sought, “[b]ackup and material that supports March 23, 2009 public statement at the Council meeting that construction for the Library cost \$11,335,256.” As previously stated above, 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),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

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

¹⁴ As stated in Bent, *supra*.

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)."

The Complainant's request for "[b]ackup and material" fails to identify specific government records sought. The Complainant argued in his response to the SOI dated January 11, 2010 that in the absence of a list identifying all types of records maintained, he was forced to fashion his request with a series of qualifiers because he did not know the exact title of the record sought. Although the Complainant's argument points out that it can be difficult for a requestor to accurately identify those records he/she is seeking, the request item at issue here still would have forced the Custodian to research his files to identify all of the records that would support the "March 23, 2009 public statement at the Council meeting that construction for the Library cost \$11,335,256." OPRA does not "countenance open-ended searches of an agency's files." MAG, supra.

Therefore, because the Complainant's request Item No. 2 fails to identify specific government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, the Complainant's request Item No. 2 is invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and Schuler, supra.

Whether the Custodian's delay in access to the requested records 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 (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 (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 failed to bear his burden of proving a lawful denial of access to the Complainant’s OPRA request Item No. 1 pursuant to N.J.S.A. 47:1A-6, the Custodian did provide access to the requested audit trail as part of the SOI and the Complainant’s request Item No. 2 is not a valid OPRA request. 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 identifies a type of government record (audit trail) for a specific account (Emergency Dispatch Communication Center C-4-55-009-015-009), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), do not apply to the Complainant’s request Item No. 1 seeking a “[b]udget account status/transaction audit trail for \$1,200,000 capital appropriation for emergency dispatch communication center C-04-55-009-015-009 (Police Department).” The Custodian’s search does not require research, but rather requires the Custodian to provide the audit trail for the specific account

number listed. Thus, pursuant to N.J.S.A. 47:1A-6, the Custodian failed to bear his burden of proving a lawful denial to the Complainant's OPRA request Item No. 1. However, the GRC declines to order disclosure of the requested audit trail because the record was provided to the Complainant as part of the Statement of Information.

2. Because the Complainant's request Item No. 2 fails to identify specific government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, the Complainant's request Item No. 2 is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's OPRA request Item No. 1 pursuant to N.J.S.A. 47:1A-6, the Custodian did provide access to the requested audit trail as part of the Statement of Information and the Complainant's request Item No. 2 is not a valid OPRA request. 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.

Prepared By: Frank F. Caruso
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Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011