



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2009-35

v.

Hunterdon County Prosecutor's Office
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council ("Council") considered the December 9, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Complainant identified types of records in request Item No. 2 and requested data and information in request Items No. 3, No. 4 and No. 5 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 items are invalid under OPRA 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, 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).



3. The Custodian stated in the Statement of Information that the Hunterdon County Prosecutor's Office did not possess any records responsive to the Complainant's request Items No. 2 through No. 5 and subsequently certified to such on October 22, 2009, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required seven (7) business days resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's request Items No. 2 through No. 5 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial, because the Complainant's request Items No. 2 through No. 5 are invalid under OPRA and because the Custodian certified that no records responsive to request Item No. 2 through No. 5 exist, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council
On The 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2009-35

v.

**Hunterdon County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Agency policy, including reporting mechanism and sample forms, in accordance with Attorney General Directive 2007-3 ("Directive 2007-3").³
2. Any and all logs, reports, forms and entries relating to reporting and compliance of Directive 2007-3. These items should include names, addresses, year of birth, country of origin, offense(s), location of incident and alleged offense which precipitated notifying U.S. Customs and Immigration Enforcement ("ICE") authorities for the years 2007 and 2008 up to October 31, 2008.
3. Countrywide data with any and all logs, reports, forms and entries relating to the reporting and compliance of Directive 2007-3. These items should include names, addresses, year of birth, country of origin, offense(s), location of incident and alleged offense which precipitated notifying U.S. Customs and Immigration Enforcement ("ICE") authorities for the years 2007 and 2008 up to October 31, 2008.
4. List of law enforcement reporting 2007-3 incidents to the County Prosecutor.
5. Names of law enforcement officers (and employing agency) who failed to qualify with a firearm in accordance with the Attorney General semi-annual qualification regulations in 2007.
6. Quarterly Internal Affairs summary report (blank form) currently used by law enforcement agencies to forward complaint summaries to the County Prosecutor.

Request Made: December 16, 2008

Response Made: January 26, 2008

Custodian: Bennett A. Barlyn⁴

GRC Complaint Filed: January 27, 2009⁵

¹ No legal representation listed on record.

² Represented by Gaetano DeSapio, Esq. (Frenchtown, NJ).

³ The Complainant notes that he does not want a copy of the actual Directive 2007-3.

⁴ The original custodian of records named on this complaint is Kristen Larson.

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

Background

December 16, 2008

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

December 17, 2008

Note from Robert L. Greene ("Mr. Greene"), Records Management Analyst for Hunterdon County, to the Complainant. Mr. Greene states that the Complainant's request has been forwarded to the original Custodian of the Hunterdon County Prosecutor's Office ("HCPO") via interdepartmental mail. Mr. Greene states that the HCPO has their own process for handling OPRA requests.

January 26, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twenty-fifth (25th) business day following receipt of such request. The Custodian states that records responsive to request Item No. 1 and No. 6 are available for inspection.

The Custodian states that access to request Items No. 2, No. 4 and No. 5 is denied because the request items are not valid requests for government records pursuant to OPRA.⁶ The Custodian avers that compliance with the Complainant's request items would compel the Custodian to extract, collect and compile data. The Custodian avers that OPRA only allows requests for records, not requests for information. The Custodian states that OPRA is not intended as a research tool to force government officials to identify and siphon useful information; a records custodian is not required to conduct research among its records and correlate data from various government records.

Further, the Custodian states that requests under OPRA must reasonably identify a specific government record and not data, information or statistics and cites to Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

Additionally, the Custodian avers that the Complainant's request is overbroad and of the nature of a blanket request for a class of various documents and cites to Bent, supra, MAG, supra, Asarnow v. New Jersey Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006), Feiler-Jampel v. Office of the Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (July 2008) and Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2009).

January 27, 2009

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

⁶The evidence of record suggests that the Custodian's omission of request Item No. 3 in his response to the Complainant appears to be in error.

- Complainant's OPRA request dated December 16, 2008.
- Complainant's OPRA request dated December 16, 2008 with Mr. Greene's handwritten note thereon.

The Complainant states that he submitted an OPRA request to the HCPO via facsimile on December 16, 2008. The Complainant states that Mr. Greene responded in writing on December 17, 2008 stating that the Complainant's request was forwarded to the original Custodian via interdepartmental mail.

The Complainant states that he attempted to contact the original Custodian on January 15, 2009 regarding the status of request. The Complainant argues that he has not received a response from the original Custodian.

The Complainant does not agree to mediate this complaint.

March 3, 2009

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

March 9, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 16, 2008.
- Letter from the Custodian to the Complainant dated January 26, 2009.

The Custodian certifies that although the Complainant's request was sent to Hunterdon County, the Custodian did not actually receive the Complainant's request until late January.⁷

The Custodian certifies that he responded to the Complainant on January 26, 2009 stating that records responsive to request Item No. 1 and No. 6 are available for inspection. Further the Custodian certifies that he advised the Complainant that the request for Items No. 2, No. 4 and No. 5 is denied because the request items are not valid requests for government records pursuant to OPRA.

The Custodian argues that the HCPO cannot comply with request Items No. 2 through No. 5 because such requests seek data that have not been correlated in any records maintained by the HCPO. Additionally, the Custodian certifies that the HCPO does not have in its possession the information, data, etc., that the Complainant sought in these OPRA request items.

Further, the Custodian asserts that the Complainant's request Items No. 2, No. 3 and No. 4 are overbroad because "logs, reports, forms and entries" could encompass a multitude of records. The Custodian asserts that the Complainant also fails to specifically

⁷The Custodian confirmed via telephone on September 29, 2009 that the Custodian cannot identify the exact date which he received the Complainant's request from the County of Hunterdon.
Richard Rivera v. Hunterdon County Prosecutor's Office, 2009-35 – Findings and Recommendations of the Executive Director

state whether the requested information is in the possession of the HCPO or the many municipal law enforcement offices in Hunterdon County.

October 19, 2009

E-mail from the GRC to the Custodian. The GRC states that the Custodian asserts in the SOI that “[p]ut bluntly, this office does not have in its possession the information, data, etc., that [the Complainant] sought in his OPRA request.” The GRC requests that the Custodian legally certify to the following:

1. Whether any records responsive to the Complainant’s request Items No. 2, No. 3, No. 4 and No. 5 exist in the possession of the Hunterdon County Prosecutor’s Office?

The GRC requests that the Custodian provide the requested legal certification by close of business on October 22, 2009.

October 22, 2009

Custodian’s legal certification. The Custodian certifies that the HCPO does not possess any records responsive to the Complainant’s request Items No. 2, No. 3, No. 4 and No. 5.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, although the Custodian asserted in the SOI that he received the Complainant's OPRA request in late January, the Custodian could not recollect the actual date of receipt. Further, the Custodian did not respond until January 26, 2009, the twenty-fifth (25th) business day after the Complainant request was received and forwarded to the Custodian by the County of Hunterdon.

⁸ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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

Next, the GRC examines whether there was an unlawful denial of access because the Custodian denied access to request Items No. 2 through No. 5 because the request items either failed to identify a specific government record or sought information that would have required the Custodian to conduct research and correlate data in order to respond.

The Complainant's request Items No. 2 through No. 5 sought logs, reports, forms, entries, countywide data, a list of law enforcement reporting Directive 2007-3 incidents and names of officers failing to qualify with a firearm. The Custodian responded on January 26, 2009 stating that these request items are not valid requests for government records pursuant to OPRA because compliance with the Complainant's request items would compel the Custodian to extract, collect and compile data.

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..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid

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

¹⁰ As stated in Bent, supra.

and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

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

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’¹¹ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’¹²”

The Complainant’s request Item No. 2 in the instant complaint identifies certain types of records but fails to identify a specific time frame and would require the Custodian to research his records to locate records containing information regarding Directive 2007-3. Further, the Complainant’s request Items No. 3 through No. 5 seek dates and information; however, the Custodian is only required to respond to requests for specific government records and not requests for information. MAG, *supra*.

Therefore, although the Complainant identified types of records in request Item No. 2 and requested data and information in request Items No. 3, No. 4 and No. 5 the Custodian is not required to conduct research in response to a request pursuant to Donato, *supra*. As such, the Complainant’s request items are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Moreover, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified in the SOI that no records responsive to the Complainant’s request existed. The GRC determined that, because the Custodian certified that no records

¹¹ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹² “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Richard Rivera v. Hunterdon County Prosecutor’s Office, 2009-35 – Findings and Recommendations of the Executive Director

responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian stated in the SOI that the HCPO did not possess any records responsive to the Complainant's request Items No. 2 through No. 5 and subsequently certified to such on October 22, 2009, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required seven (7) business days resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's request Items No. 2 through No. 5 pursuant to Pusterhofer, 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 (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial, because the Complainant's request Items No. 2 through No. 5 are invalid under OPRA and because the Custodian certified that no records responsive to

request Items No. 2 through No. 5 exist, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Complainant identified types of records in request Item No. 2 and requested data and information in request Items No. 3, No. 4 and No. 5 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 items are invalid under OPRA 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, 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).
3. The Custodian stated in the Statement of Information that the Hunterdon County Prosecutor's Office did not possess any records responsive to the Complainant's request Items No. 2 through No. 5 and subsequently certified to such on October 22, 2009, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required seven (7) business days resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's request Items No. 2 through No. 5 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial, because the Complainant's request Items No. 2 through No. 5 are invalid under OPRA and because the Custodian certified that no records responsive to request Item No. 2 through No. 5 exist, it is

concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009