



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

John Allen
Complainant

Complaint No. 2009-38

v.

Mercer 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 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).
2. Request Item Nos. 1, 2 and 3 are invalid because they are overly broad and do not identify with reasonable clarity the records sought 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. Request Item No. 4 is invalid because it seeks access to information and does not identify a specific government record. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Request Item No. 6 is invalid because it is overly broad and unclear and does not identify a specific government record. 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).

5. Because the Custodian has certified that no records responsive to Request Item Nos. 5, 7, and 8 exist and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 5, 7, and 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Although the Custodian's failure to respond within seven (7) business days resulted in a "deemed" denial, 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 because Request Item Nos. 1-4 and 6 are invalid under OPRA and the Custodian certified that no records responsive to Request Item Nos. 5, 7, and 8 exist. However, the Custodian's "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**

**John Allen¹
Complainant**

GRC Complaint No. 2009-38

v.

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

Records Relevant to Complaint:

1. All applications and authorizations for oral and wire interceptions submitted by Lt. Manetto, Armstead Robinson, and plain-clothes Officer Maldonado of the Trenton Police Department between 1986 and 1992.
2. All applications and authorizations for oral and wire interceptions submitted by Robert Tedder of the Trenton Police Department between 1986 and 1992.
3. All records of interceptions authorized by the Mercer County Prosecutor's Office from 1986 to 1992.
4. County Prosecutor's determination that there was reasonable cause to suspect that evidence of a crime would be gained from intercepting John Allen's conversation with informant LC Pegues.
5. Copies of authorizations, reports, or periodicals submitted by Mercer County Prosecutor's Office and maintained by the New Jersey Attorney General regarding N.J.S.A. 24:156A-4c pursuant to N.J.S.A. 2A:156A-23.
6. Master reel of the recorded conversation between Mr. Pegues and John Allen that was reviewed by the New Jersey State Police, Trenton Police Department and Pegues.
7. Mercer County Prosecutor's Office annual reports to the Governor and the Legislature on the operation of N.J.S.A. 2A:156A-4c between 1986 and 1992 pursuant to N.J.S.A. 2A:156A-23.
8. Mercer County Prosecutor's Office supplemental reports forwarded to the State Legislative Office between 1986 and 1992 on N.J.S.A. 2A:156A-4c pursuant to N.J.S.A. 2A:156A-23.

Request Made: November 7, 2008

Response Made: November 24, 2008

Custodian: Joseph Bocchini, Jr.

GRC Complaint Filed: January 29, 2009³

¹ No legal representation listed on record.

² Represented by DAG Angel Onofri, on behalf of the NJ Attorney General.

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

Background

November 7, 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.⁴

November 24, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states that pursuant to OPRA, a request for public records must specifically describe the records sought. The Custodian states that Request Items Nos. 1, 2 and 3 are overly broad. The Custodian states that OPRA does not require records custodians to conduct research for a requestor nor to correlate data from various government records in its possession. The Custodian states that this request involves research beyond the scope of OPRA. The Custodian states that:

“while OPRA provides an alternative means of access to government documents not otherwise exempt 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.” MAG Entertainment v. Div. of Alcoholic Bev. Control, 375 N.J. Super. 534 (App. Div. 2005).

Additionally, the Custodian states that the request for the determination by the County Prosecutor at Request Item No. 4 is a request for information, not a request for a specific government record.

The Custodian states that the remaining items of the OPRA request relate to police investigation reports and reports relied upon for wiretap authorizations. The Custodian states that the records responsive to these items are criminal investigative files which are specifically exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1. The Custodian states that this exemption applies to open and closed files. The Custodian states that the Complainant's request for these records is denied pursuant to these guidelines. The Custodian states that this request appears to seek records concerning a criminal matter in which the Complainant is named as a defendant. The Custodian states that any records related to the case would have been provided to the Complainant in discovery during prior proceedings.

The Custodian states that because no copying fees were incurred, the Custodian is returning the Complainant's check.

January 29, 2009

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

⁴The Complainant enclosed a check in the amount of \$25 for copying fees.
John Allen v. Mercer County Prosecutor's Office, 2009-38 – Findings and Recommendations of the Executive Director

- Complainant’s OPRA request dated November 7, 2008;
- Letter from the Custodian to the Complainant dated November 24, 2008.

The Complainant states that the Custodian unlawfully denied him access to the records requested.

February 10, 2009

Offer of Mediation sent to both parties.

February 24, 2009

The Complainant agrees to mediate this complaint. The Custodian did not respond to the Offer of Mediation.

May 8, 2009

Request for the Statement of Information sent to the Custodian.

May 14, 2009

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated November 7, 2008;
- Letter from the Custodian to the Complainant dated November 24, 2008;
- Copy of the Denial of Access Complaint.

The Custodian submitted the following index regarding the Complainant’s OPRA request:

(A) List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).	(B) List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request	(C) List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).	(D) If records were disclosed with redactions, give a general nature description of the redactions.	(E) If records were denied in their entirety, give a general nature description of the record.	(F) List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.
All applications and authorizations for oral and wire interceptions submitted by Lt. Manetto, Armstead Robinson and plain-clothes Officer Maldonado of the Trenton Police	Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after	None.	N/A	Requested items are part of a criminal investigatory file.	<u>N.J.S.A. 47:1A-1.1.</u> specifically exempts criminal investigatory files from disclosure. Further, the collection of requested information

<p>Department, between 1986 and 1992.</p>	<p>information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number 0018-000010007.</p>				<p>involves research beyond the scope of OPRA. <u>MAG Entertainment v. Div. Of Alcoholic Beverage Control</u>, 375 N.J. Super. 534 (App. Div. 2005). The request is overly broad.</p>
<p>All applications and authorizations for oral and wire interceptions submitted by Robert Tedder of the Trenton Police Department, between 1986 and 1992.</p>	<p>Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number 0018-000010007.</p>	<p>None.</p>	<p>N/A</p>	<p>Requested items are part of a criminal investigatory file.</p>	<p><u>N.J.S.A. 47:1A-1.1.</u> specifically exempts criminal investigatory files from disclosure. Further, the collection of the requested information involves research beyond the scope of OPRA. <u>MAG Entertainment v. Div. Of Alcoholic Beverage Control</u>, 375 N.J. Super. 534 (App. Div. 2005). The request is overly broad.</p>
<p>All records of interceptions authorized by the Mercer County Prosecutor's Office from 1986 to 1992.</p>	<p>Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record</p>	<p>None.</p>	<p>N/A</p>	<p>Requested items are part of a criminal investigatory file.</p>	<p><u>N.J.S.A. 47:1A-1.1.</u> specifically exempts criminal investigatory files from disclosure. Further, the collection of the requested information involves research beyond the scope of OPRA. <u>MAG Entertainment v. Div. Of Alcoholic</u></p>

	Series Number 0018-000010007.				<u>Beverage Control, 375 N.J. Super. 534 (App. Div. 2005)</u> . The request is overly broad.
County Prosecutor's determination that there was reasonable cause to suspect that evidence of a crime would be gained from intercepting John Allen's conversation with informant Mr. Pegues.	The requested information is not specifically described and is imprecise. However, Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number 0018-000010007.	None.	N/A	Requested items are part of a criminal investigatory file.	<u>N.J.S.A. 47:1A-1.1</u> . specifically exempts criminal investigatory files from disclosure. Further, the collection of requested information involves research beyond the scope of OPRA. <u>MAG Entertainment v. Div. Of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005)</u> . The request is overly broad. The request is not a request for a record and calls for a conclusion.
Copies of authorizations, reports, or periodicals submitted by Mercer County Prosecutor's Office and maintained by the NJ Attorney General regarding <u>N.J.S.A. 24:156A-4c</u> pursuant to <u>N.J.S.A. 2A:156A-23</u> .	Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number 0018-	None.	N/A	The record does not exist.	The record does not exist. <u>N.J.S.A. 47:1A-1.1</u> . specifically exempts criminal investigatory files from disclosure. Further, the collection of requested information involves research beyond the scope of OPRA. <u>MAG Entertainment v. Div. Of Alcoholic Beverage Control,</u>

	000010007				375 N.J. Super. 534 (App. Div. 2005).
Master reel of the recorded conversation between Mr. Pegues and John Allen that was reviewed by the New Jersey State Police, Trenton Police Department and Mr. Pegues.	Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number 0018-000010007	None.	N/A	Requested items are part of a criminal investigatory file.	N.J.S.A. 47:1A-1.1. specifically exempts criminal investigatory files from disclosure.
Mercer County Prosecutor's Office annual reports to the Governor and the Legislature on the operation of <u>N.J.S.A. 2A:156A-4c</u> between 1986 and 1992 pursuant to <u>N.J.S.A. 2A:156A-23</u> .		None.	N/A	The record does not exist; requests data.	See <u>MAG, supra</u> . Also, public entities are not required to create reports which do not otherwise exist. <u>Bent v. Township of Stafford</u> , 351 N.J. Super. 30 (App. Div. 2005).
Mercer County Prosecutor's Office supplemental reports forwarded to the State Legislative Office between 1986 and 1992 on <u>N.J.S.A. 2A:156A-4c</u> pursuant to <u>N.J.S.A. 2A:156A-23</u> .	Retention Schedule C310000-903, Record Series No. 022-0003 provides for retention for 1 year after information is incorporated into reports. Items also kept in criminal investigatory file, Record Series Number	None.	N/A	The record does not exist; requests data.	See <u>MAG, supra</u> . Also, public entities are not required to create reports which do not otherwise exist. <u>Bent v. Township of Stafford</u> , 351 N.J. Super. 30 (App. Div. 2005).

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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 further 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.

OPRA also states 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 Custodian responded to the Complainant’s request on the tenth (10th) business day following receipt of same stating that Request Item Nos. 1 and 2 were broad and unclear and therefore invalid under OPRA. The Custodian also stated that Request Item No. 4 was an invalid request for information. The Custodian further stated that the remaining request items were part of a criminal investigation file and therefore not disclosable under OPRA. The Custodian later certified in the SOI that there were no records responsive to Request Items Nos. 5, 7, and 8.

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

Therefore, the Custodian’s failure to respond in writing to the 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).

Nevertheless, the Complainant’s request for Item Nos. 1, 2 and 3 is invalid under OPRA. 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*

⁵ 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.

'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),⁶ the Superior Court referenced 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."⁷

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)."

Request Item Nos. 1, 2 and 3 in the complaint currently before the Council are overly broad and would require the Custodian to conduct research. Request Item Nos. 1 and 2 seek access to "all applications and authorizations for oral and wire interceptions" submitted by four (4) police officers over a seven (7) year period. Request Item No. 3 seeks access to all Mercer County Prosecutor's Office interception records over the same seven (7) year period. Pursuant to Bent, *supra*, a valid 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." While Request Item Nos. 1 and 2 specially limit the requests to those applications and authorizations submitted by the four (4) named officers, the Complainant requests these records for every case upon which the named officers worked over a seven (7) year period. Furthermore, Request Item No. 3 seeks access to all Mercer County Prosecutor's Office interception records for the same seven (7) year period. Pursuant to Bent, *supra*, such broad general requests are not valid under OPRA.

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

Therefore, Request Item Nos. 1-3 are invalid because they are overly broad and do not identify with reasonable clarity the records sought 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

Moreover, Request Item No. 4 is an invalid request for information because a ‘determination’ is not a record but rather information. In Request Item No. 4, the Complainant seeks access to the “County Prosecutor’s determination that there was reasonable cause to suspect that evidence of a crime would be gained...” Request Item No. 4 essentially seeks access to the County Prosecutors conclusion that there was reasonable cause. Request Item No. 4 identifies the type of information sought by the Complainant. However, it does not identify the record that contains the information sought. “A requestor must specifically describe the document sought because OPRA operates to make *identifiable government records ‘accessible.’*” (Emphasis added.) Bent, supra.

Therefore, Request Item No. 4 is invalid because it seeks access to information and does not identify a specific government record. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC now turns its attention to Request Item No. 6. Request Item No. 6 seeks access to a master reel of a recorded conversation between a named officer and the Complainant. The Complainant does not provide a date upon which the conversation is alleged to have occurred, a file name or complaint number. While the Complainant identified a master reel of this recorded conversation as the record sought, the Complainant failed to provide sufficient identifying information to permit the Custodian to locate the record requested. Pursuant to Bent, supra, a valid 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.” While Request Item No. 6 identifies a type of record, the description of the records sought is so broad and unclear that a custodian would be unable to identify the particular record sought.

Therefore, Request Item No. 6 is invalid because it is overly broad and unclear and does not identify a specific government record. 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).

Additionally, the Custodian has certified in the SOI that no records responsive to Request Items Nos. 5, 7, and 8 exist. The Complainant has not submitted any evidence to refute this certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone records showing a call made to him from the New Jersey Department of Education. The custodian certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Because the Custodian has certified that no records responsive to Request Items Nos. 5, 7, and 8 exist and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 5, 7, and 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 respond within seven (7) business days resulted in a “deemed” denial, 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 because Request Item Nos. 1-4 and 6 are invalid under OPRA and the Custodian certified that no records responsive to Request Item Nos. 5, 7, and 8 exist. However, the Custodian's "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 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).
2. Request Item Nos. 1, 2 and 3 are invalid because they are overly broad and do not identify with reasonable clarity the records sought 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. Request Item No. 4 is invalid because it seeks access to information and does not identify a specific government record. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Request Item No. 6 is invalid because it is overly broad and unclear and does not identify a specific government record. 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).
5. Because the Custodian has certified that no records responsive to Request Item Nos. 5, 7, and 8 exist and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 5, 7, and 8 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Although the Custodian's failure to respond within seven (7) business days resulted in a "deemed" denial, 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 because Request Item Nos.

1-4 and 6 are invalid under OPRA and the Custodian certified that no records responsive to Request Item Nos. 5, 7, and 8 exist. However, the Custodian's "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.

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Executive Director

December 9, 2009