



**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**

**November 18, 2009 Government Records Council Meeting**

Steven Fenichel  
Complainant

Complaint No. 2009-72

v.

Cape May County Prosecutor's Office  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 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. Because the Complainant's records request seeks access to information and fails to identify the specific government records sought, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's records request was invalid, 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 18<sup>th</sup> Day of November, 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: November 23, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Steven Fenichel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-72**

v.

**Cape May Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Information on the status of the criminal misconduct investigation involving City Engineer Robert Garrett.
2. Review, summary, or conclusion of the criminal misconduct investigation involving City Engineer Robert Garrett.
3. If the criminal misconduct investigation involving City Engineer Robert Garrett is not completed, the Complainant requests the anticipated date of completion.

**Request Made:** February 6, 2009

**Response Made:** March 6, 2009

**Custodian:** Robert Taylor

**GRC Complaint Filed:** March 2, 2009<sup>3</sup>

**Background**

**February 6, 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.

**March 2, 2009**

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

- Letter from the Complainant to the Custodian dated January 12, 2009;
- Complainant's OPRA request dated February 6, 2009.

The Complainant asserts that an employee of the Cape May County Prosecutor's Office informed the Complainant on behalf of the Custodian that although the ethics

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Legal representation listed on record was not consulted in this matter.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

complaint was dismissed, the case still remains open and is therefore confidential.<sup>4</sup> The Complainant further states that he did not receive a written response to his OPRA request from the Cape May County Prosecutor's Office.

The Complainant does not agree to mediate this complaint.

### **March 6, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the nineteenth (19<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records requested are criminal investigatory records and OPRA specifically exempts criminal investigatory records from the definition of a government record.

### **April 9, 2009**

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

### **May 4, 2009**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on April 9, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

### **May 6, 2009**

Custodian's SOI with the following attachments

- Complainant's OPRA request dated February 6, 2009;
- Letter from the Custodian to the Complainant dated March 6, 2009.

The Custodian certifies that the Cape May County Prosecutor's Office denied the Complainant access to records concerning the investigation into alleged criminal misconduct by Ocean City Engineer Richard Carter. The Custodian further certifies that on March 6, 2009 the Cape May County Prosecutor's Office denied access to the requested records in writing because the records sought are criminal investigatory records exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certifies that that the records requested are criminal investigatory records.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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<sup>4</sup> The evidence of record indicates that a complaint against the City Engineer was previously pending before the Ocean City Ethics Commission. The Ocean City Ethics Commission found that the complaint was beyond their jurisdiction and referred the matter to the Cape May County Prosecutor's Office. Steven Fenichel v. Cape May County Prosecutor's Office, 2009 - 72 - Findings and Recommendations of the Executive Director 2

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Custodian responded in writing to the Complainant’s OPRA request on the nineteenth (19<sup>th</sup>) business day after receiving said request stating that access to the requested records was denied because the records requested were criminal investigatory records and therefore exempt from disclosure under OPRA.

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.<sup>5</sup> 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).

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<sup>5</sup> 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 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).

Despite the Custodian's failure to respond in a timely manner to the Complainant's record request, the request remains invalid. 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),<sup>6</sup> 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."<sup>7</sup>

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

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

<sup>7</sup> As stated in Bent, *supra*.

(App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

Request Items Nos. 1 and 3 seek access to “information on the status of the criminal misconduct investigation” and “the anticipated date of completion” respectively. Both Request Items No. 1 and 3 identify information sought as opposed to an identifiable government record. Furthermore, Request Item No. 2 seeks access to the “review, summary, or conclusion of the criminal misconduct investigation.” Request Item No. 2 therefore similarly fails to specify an identifiable government record. OPRA only operates to make identifiable government records accessible to the public. MAG, supra.

Therefore, because the Complainant’s records request seeks access to information and fails to identify the particular records sought, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

**Whether 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

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negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

The Custodian responded in writing to the Complainant's request on the nineteenth (19<sup>th</sup>) business day after receiving said request. The Council has found that the Complainant's records request is invalid because it sought access to information and failed to identify the particular records sought.

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's records request was invalid, 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 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. Because the Complainant's records request seeks access to information and fails to identify the specific government records sought, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
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Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009