



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

William L. Scott
Complainant

Complaint No. 2010-169

v.

County of Essex
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian’s response was timely, he failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because Mr. Serio certified in the Statement of Information that the records provided to the Complainant were not altered in any way and that the records were scanned into the OnBase document management system and that the Division used this system to retrieve said records to provide to the Complainant, the Council has no authority over the condition of records sent by the Custodian of Records pursuant to N.J.S.A. 47:1A-7.b., Toscano v. NJ Dep’t of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003). *See also* Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because the Custodian provided an incomplete copy of page eight (8) for Record No. 2, MHA 2009 Application, to the Complainant in response to his OPRA request when a complete record existed at the time of said request, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).
4. Because the Complainant’s request Item No. 2 fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and 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).

5. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because he failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record. The Custodian also violated N.J.S.A. 47:1A-1 by initially providing the Complainant with an incomplete copy of page eight (8) to the MHA 2009 Application. However, the Complainant's request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record. Furthermore, the Custodian provided the Complainant with the full legal-size record of page eight (8) for Record No. 2 with the SOI. 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 25th Day of April, 2012

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: April 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**William L. Scott¹
Complainant**

GRC Complaint No. 2010-169

v.

**County of Essex²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Completed CDBG/CHDO/HOME Application for grant of \$350,000 submitted by Mental Health Association (“MHA”) of Essex County for the proposed project at 354 Orange Road, Montclair, NJ.
2. Any and all letters and documents of support and/or approvals for the CDBG/CHDO/HOME grant application for \$350,000 for MHA whether it be municipal, county, State, PHA, or PJ, HUD and/or any other approvals or letters of support for MHA proposed project of new construction at 354 Orange Road, Montclair, NJ.

Request Made: June 30, 2010

Response Made: July 1, 2010

Custodian: Al Fusco

GRC Complaint Filed: July 23, 2010³

Background

June 30, 2010

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.

July 1, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing on the first (1st) business day following receipt of such request. The Custodian states that the following records are responsive to the Complainant’s OPRA request: 1) two (2) applications submitted by MHA for 354 Orange Road, Montclair, NJ; 2) public notices indicating the County of Essex’s intent to utilize HOME funds for this project.⁴ The Custodian states upon receipt of copying costs in the amount of \$20.25, the records will be mailed or can be picked up by the Complainant.

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq., on behalf of Office of Essex County Counsel (Newark, NJ).

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

⁴ It appears that these records are responsive to request Item No. 1.

July 23, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁵

- Public Hearing Notice for 2010 through 2014 Five (5) Year Consolidation Plan and One (1) Year Action Plan
- MHA 2009 Application to the Essex County Home Investment Partnership Program (“HOME”) for 354 Orange Road, Montclair, NJ
- MHA 2010 Application to the Essex County Home Investment Partnership Program (“HOME”) for 354 Orange Road, Montclair, NJ.

The Complainant states that he filed an OPRA request on June 30, 2010 for: 1) Completed CDBG/CHDO/HOME Application for grant of \$350,000 submitted by MHA of Essex County for the proposed project at 354 Orange Road, Montclair, NJ; and 2) Any and all letters and documents of support and/or approvals for the CDBG/CHDO/HOME grant application for \$350,000 for MHA whether it be municipal, county, State, PHA, or PJ, HUD and/or any other approvals or letters of support for MHA proposed project of new construction at 354 Orange Road, Montclair, NJ. The Complainant also states that the Custodian responded to his OPRA request stating that records responsive to his request were ready to be picked up.

The Complainant asserts the following for each record:

Record No. 1: Public Hearing Notice for 2010 through 2014 Five (5) Year Consolidation Plan and One (1) Year Action Plan, four (4) pages total:

Page Number	Complainant’s Assertion
Page one (1)	The Complainant asserts that the record is not legible.
Page two (2)	The Complainant asserts that the record is not legible.

Record No. 2: MHA 2009 Application to the Essex County HOME for 354 Orange Road Montclair, NJ, nineteen (19) pages total:

Page Number	Complainant’s Assertion
Page four (4)	The Complainant asserts that information appears to have been removed from the category “Part VI, Performance Measurement.”
Page six (6)	The Complainant asserts that the application was due no later than December 18, 2008; however, the Complainant notes that the application is date stamped February 4, 2009.

⁵ The Complainant included an OPRA request dated July 9, 2010. This OPRA request is not relevant to the adjudication of this Denial of Access Complaint.

Page six (6)	The Complainant asserts that it appears that several pages of this section are missing.
Page seven (7)	The Complainant asserts that he requested information regarding 354 Orange Road, Montclair, NJ. However, the Complainant asserts that the development budget included in this application is for a potential site address at 184 Kingsland Avenue, Nutley, NJ.
Page eight (8)	The Complainant asserts that information appears to be missing from the bottom of the page.

Record No. 3: MHA 2010 Application to the Essex County HOME for 354 Orange Road, Montclair, NJ twenty-seven (27) pages:

Page Number	Complainant's Assertions
Page three (3)	The Complainant asserts that information appears to be missing under the category, "Part II – Implementation."
Page four (4)	The Complainant asserts that information is missing from the middle of the page.
Page four (4)	The Complainant asserts that the application indicates that the total number of households/units to be assisted with requested funds is eleven (11). The Complainant asserts that the total number of units should be twelve (12). The Complainant questions who is funding the twelfth (12 th) unit.
Page five (5)	The Complainant asserts that information appears to be missing under the category "Part IV – Funding Sources."
Page six (6)	The Complainant asserts that the top of this page appears to be missing information.
Page seven (7)	The Complainant asserts that information appears to be missing under the category "Part VI – Performance Measurement."

The Complainant states that he believes the Custodian did not copy the original records responsive to his OPRA request. The Complainant also states that he did not receive any records responsive to request Item No. 2. The Complainant further states that when he reviewed the records responsive to his request, such records state that all program and project records are available for inspection at the Division of Housing and Community Development ("Division") during the office hours of 8:30 a.m. to 4:30 p.m. The Complainant states that he went to this office and requested to see the original 2009 and 2010 MHA applications. The Complainant also states that Deputy Director, George F. Serio ("Mr. Serio"), denied him access to these records and stated that an OPRA

request must be made and the legal department must review the request for any Health Insurance Portability and Accountability Act related issues.

The Complainant does not agree to mediate this complaint.

July 26, 2010

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

August 3, 2010

E-mail from the GRC to the Custodian. The GRC confirms a five (5) business day extension to complete the SOI. The GRC informs the Custodian that the new due date will be August 10, 2010.⁶

August 6, 2010⁷

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 30, 2010
- Custodian’s response to the OPRA request dated July 1, 2010
- Memorandum from George F. Serio, Jr., Deputy Director, Essex County Division of Housing and Community Development, to the Custodian dated August 4, 2010

Mr. Serio states that he received and reviewed a copy of the Complainant’s Denial of Access Complaint.⁸ Mr. Serio also states that the records provided to the Complainant were not altered in any way by the Division. Mr. Serio further states that the Division scans all records received into a document management system certified by the New Jersey State Records Committee (“SRC”). Mr. Serio also states that the records cannot be altered once they are scanned into the system. Lastly, Mr. Serio states that the Division used the On Base document management system to retrieve the records requested by the Complainant.

Mr. Serio states that the following is a response to the Complainant’s assertions in his Denial of Access Complaint.

Record No. 1: Public Hearing Notice for 2010 through 2014 Five (5) Year Consolidation Plan and One (1) Year Action Plan, four (4) pages total :

Page Number	Complainant’s Assertion	Mr. Serio’s Response to the Complainant’s Assertions
Page one (1) and Page two (2)	The Complainant asserts that the record is not legible.	These records are a scan of the original record that appeared in the Newark Star Ledger on March 18,

⁶ The Custodian telephoned the GRC on August 3, 2010 requesting an extension of time to complete the SOI.

⁷ The parties submitted additional correspondence. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

⁸ Mr. Serio, rather than the Custodian responded to the Complainant’s assertions made in his Denial of Access Complaint.

		2010. This advertisement notifies the public of the Division’s awards for the Community Development Block Grant (“CDBG”) program, Emergency Shelter Grant program and HOME program. The record was not altered in anyway, but the copy appears to be cut off on the right and left margins; this is how the record appeared in the Star Ledger. The Division obtained a version that appeared in a later edition and has attached a copy of these records.
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Record No. 2: MHA 2009 Application to the Essex County HOME for 354 Orange Road Montclair, NJ, nineteen (19) pages total:

Page Number	Complainant’s Assertion	Mr. Serio’s Response to the Complainant’s Assertions
Page four (4)	The Complainant asserts that information appears to be removed from the category, “Part VI, Performance Measurement.”	These records are scans of the original application submitted by the applicant. The Division could not alter the record since it was scanned into the OnBase document management system.
Page six (6)	The Complainant asserts that the application was due no later than December 18, 2008, however the Complainant notes that the application is date stamped February 4, 2009.	The MHA submitted an application on December 17, 2008 for a different site address. The MHA subsequently requested to modify their application, which was submitted on February 4, 2009. The Complainant’s OPRA request sought specific applications by MHA for the site address 354 Orange Road, Montclair, NJ.
Page six (6)	The Complainant asserts that it appears several pages of this section are missing.	This is simply a typographical error on the application.
Page seven (7)	The Complainant asserts that he requested information regarding 354 Orange Road Montclair, NJ. However, the Complainant asserts that the development budget included in this application is for a potential site address at 184	The MHA submitted this document as part of their application. It is the Division’s policy to scan all applications as they are submitted.

	Kingsland Avenue, Nutley, NJ.	
Page eight (8)	The Complainant asserts that information appears to be missing from the bottom of the page.	This record appeared on legal size paper and when scanned it was cut off at year six (6). The full legal size record has been provided with this SOI.

Record No. 3: MHA 2010 Application to the Essex County HOME for 354 Orange Road, Montclair, NJ, twenty-seven (27) pages total:

Page Number	Complainant's Assertions	Mr. Serio's Response to the Complainant's Assertions
Page three (3)	The Complainant asserts that information appears to be missing under the category, "Part II – Implementation."	This is a scan of the original application submitted by MHA.
Page four (4)	The Complainant asserts that information is missing from the middle of the page.	This is a scan of the original application submitted by MHA.
Page four (4)	The Complainant asserts that the application indicates that the total number of households/units to be assisted with requested funds is eleven (11). The Complainant asserts that the total number of units should be twelve (12). The Complainant questions who is funding the twelfth (12 th) unit.	The Division simply provided the records requested and any specific questions regarding the contents of the application should have been submitted in writing to the Division prior to a complaint being filed.
Page five (5)	The Complainant asserts that information appears to be missing under the category, "Part IV – Funding Sources."	This is a scan of the original application submitted by MHA.
Page six (6)	The Complainant asserts that the top of this page appears to have missing information.	This is a scan of the original application submitted by MHA.
Page seven (7)	The Complainant asserts that information appears to be missing under the category "Part VI – Performance Measurement."	This is a scan of the original application submitted by MHA.

The Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, if the applications responsive to request Item No. 1 were

approved, then they must be kept for thirty (30) years, and if the applications were denied or withdrawn, then these applications must be kept on file for two (2) years.⁹

September 16, 2011

E-mail from the GRC to the Custodian. The GRC requests that Mr. Serio's responses to the Complainant's assertions in the SOI be provided in a legal certification format. The GRC also requests that Mr. Serio provide this certification within five (5) business days.

September 22, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a copy of the requested legal certification from Mr. Serio. Mr. Serio certifies that the records provided to the Complainant were not altered in any way by the Division. Mr. Serio also certifies that the Division scans all documents it receives into a document management system certified by the SRC. Mr. Serio further certifies that the Division utilizes the OnBase document management system which records an image of the document as a tagged image file format (".tiff"). Mr. Serio certifies that once the record is scanned into this system the image cannot be altered in anyway. Lastly, Mr. Serio certifies that the Division utilized this system to retrieve the records requested by the Complainant.

December 2, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from Mr. Serio indicating how many pages, excluding attachments, exist for Record No. 1, 2009 MHA Application. The GRC also requests Mr. Serio to certify whether this record is a scan of the original application submitted by MHA.

December 8, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a copy of the requested legal certification from Mr. Serio. Mr. Serio certifies that Record No. 1 contains six (6) pages excluding attachments.¹⁰ Mr. Serio also certifies that this record responsive was from the DARM approved records database, in .tiff format, which is required by the State to be approved as a certified records management system.

February 15, 2012

E-mail from the GRC to the Custodian. The GRC requests that Mr. Serio legally certify whether page eight (8) of the record responsive to request Item No. 1 was on legal size paper and that when it was scanned it cut off the information at year six (6).

February 16, 2012

E-mail from the Custodian to the GRC. The Custodian attaches a copy of the requested legal certification from Mr. Serio. Mr. Serio certifies that the record responsive to request Item No. 1 was originally on legal size paper. Mr. Serio also certifies that when this record was scanned, information was cut off at year six (6). Mr. Serio further certifies that the record included fifteen (15) years of information.

⁹ The Custodian does not certify as to what search was undertaken to locate the records responsive.

¹⁰ Record No. 1 provided along with the Complainant's Denial of Access Complaint contains six (6) pages. William L. Scott v. County of Essex, 2010-169 – Findings and Recommendations of the Executive Director

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request dated June 30, 2010?

OPRA 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 provides that:

“...a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request...” N.J.S.A. 47:1A-5.i.

The evidence of record indicates that the Complainant filed an OPRA request on June 30, 2010. The evidence of record also indicates that the Custodian responded on the following business day of receipt of such request. The evidence of record further indicates that the Custodian provided the following records in response to the Complainant's OPRA request: 1) two (2) applications submitted by MHA for 354 Orange Road, Montclair, NJ; 2) public notices indicating the County of Essex's intent to utilize HOME funds for this project. The evidence of record additionally indicates that these records are responsive for request Item No. 1. Lastly, the evidence of record indicates that the Custodian did not address the Complainant's request for Item No. 2, any and all letters and documents of support and/or approvals for the CDBG/CHDO/HOME grant application for \$350,000 for MHA whether it be municipal, county, State, PHA, or PJ, HUD and/or any other approvals or letters of support for MHA proposed project of new construction at 354 Orange Road, Montclair, NJ.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, “[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time

frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

In the matter before the Council, the Custodian responded on the first business day following receipt of the Complainant's OPRA request. Although the Custodian addressed the Complainant's request for records responsive to Item No. 1, he failed to address request Item No. 2. Furthermore, the Custodian only identified records responsive for request Item No. 1.

Although the Custodian's response was timely, he failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Whether the Council has authority over the condition or legibility of the records the Custodian provided in response to the Complainant's OPRA request Item No. 1?

The GRC has the statutory authority and the obligation to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian[.]" N.J.S.A. 47:1A-7.b.

In the instant complaint, the Complainant argued that the records he received pursuant to his OPRA request were not legible and that information appeared to be missing from some of these records. Conversely, Mr. Serio certified on September 22, 2011 that the records provided to the Complainant were a scan of the original records and that the records responsive were not altered in anyway. Mr. Serio also certified on September 22, 2011 that the Division scans all documents it receives into a document management system certified by the SRC. Mr. Serio further certified that that the Division utilizes the OnBase document management system which records an image of the document as a .tiff file. Mr. Serio additionally certified that once the record is scanned into this system the image cannot be altered in anyway. Mr. Serio further certified that the Division utilized this system to retrieve the records requested by the Complainant. Lastly, Mr. Serio certified that Request Item No. 1, 2009 MHA Application, is a six (6) page document excluding attachments. The evidence of record indicates that the Complainant submitted a six (6) page record along with his Denial of Access Complaint.

The Council has previously determined that it has no authority over the condition or legibility of records provided by a custodian, and that the integrity of a requested record is similarly outside the Council's authority. Toscano v. NJ Dep't of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC

Complaint No. 2003-68 (November 2003). *See also Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008).¹¹

In *Toscano, supra*, the complainant's denial of access complaint focused on the disorganized manner in which the requested records were provided to him. The complainant stated that "[i]t cost me \$85 to obtain this record, a stack of hundreds of documents arranged in no chronological order whatsoever." The Council determined that pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority over the condition of records sent by the custodian of records.

In *Katinsky, supra*, the complainant indicated to the GRC that the records provided to him by the custodian were "incomplete, improper and inaccurate" and one disclosure form was illegible. However, the custodian certified that copies of the requested documents given to the complainant were complete, correct and there were no redactions, and that the agency did not have a more legible set of the documents. The Council determined that:

"[t]he facts in this case indicate that the custodian provided the requester with the requested documents, and the custodian certified that they were complete, correct and contained no redactions. Therefore, the request in this case has been satisfied. The integrity of the requested documents is outside of the authority of the [Council]. For these reasons, the Council should dismiss the Complaint." *Id.*

Record No. 1: Public Hearing Notice for 2010 through 2014 Five (5) Year Consolidation Plan and One (1) Year Action Plan, four (4) pages:

The Complainant asserted that page one (1) and page two (2) of these records are not legible. Mr. Serio certified in the SOI that these records are scans of the original record that appeared in the Newark Star Ledger. Mr. Serio also certified that these records were not altered in anyway and is how the record appeared in the Star Ledger.

Record No. 2: MHA 2009 Application to the Essex County HOME for 354 Orange Road Montclair, NJ nineteen (19) pages:

The Complainant asserted that information appears to be missing from pages four (4) and six (6). Mr. Serio certified that these are original scans of the records and were not altered by the Division. The Complainant also asserted the application was due no later than December 18, 2008, however page six (6) indicates that said application was received on February 4, 2009. The Complainant further asserted that page seven (7) of the application contains information for a different site address. Mr. Serio certified that MHA submitted this record with the application and this record was scanned as submitted.

Record No. 3: MHA 2010 Application to the Essex County HOME for 354 Orange Road Montclair, NJ twenty-seven (27) pages:

¹¹ The cause of the records' illegibility is unclear in the record in *Paff*.
William L. Scott v. County of Essex, 2010-169 – Findings and Recommendations of the Executive Director

The Complainant asserted that information appears to be missing from pages three (3), four (4), five (5), six (6) and seven (7). Mr. Serio certified that this application is a scan of the original submitted by MHA. The Complainant also asserted that on page four (4) the application indicates that the total number of units to be assisted with the requested funds is eleven (11), but that the total number should be twelve (12).

The facts in this matter are similar to those of Toscano, Paff and Katinsky. In the instant complaint, the Complainant asserted that pages of the records responsive to request Item No. 1 are either missing information, illegible or contain incorrect information. However, Mr. Serio certified in the SOI that the records provided to the Complainant were not altered in any way. Mr. Serio also certified that the Division scans all documents it receives into the SRC certified OnBase document management system. Mr. Serio further certified that once these records are scanned into the OnBase document management system such records cannot be altered. Lastly, Mr. Serio certified that the Division utilized this document management system to retrieve the records requested by the Complainant.

Thus, because Mr. Serio certified in the Statement of Information that the records provided to the Complainant were not altered in any way and that the records were scanned into the OnBase document management system and that the Division used this system to retrieve said records to provide to the Complainant, the Council has no authority over the condition of records sent by the Custodian of Records pursuant to N.J.S.A. 47:1A-7.b., Toscano v. NJ Dep't of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003). *See also* Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

However regarding Record No. 2, MHA 2009 Application to the Essex County HOME for 354 Orange Road Montclair, NJ nineteen (19) pages, the Complainant asserted that information appears to be missing from the bottom of page eight (8). Mr. Serio certified that this page appeared on legal size paper and when it was scanned it cut off information at year six (6). Mr. Serio also certified the full legal size page was provided along with the SOI.

In Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011) the custodian provided records to the complainant which were partially illegible, but provided the fully legible records as part of the SOI and thus legible records existed at the time of the complainant's OPRA request. The Council held "the [c]ustodian's provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA."

The facts in the matter before the Council are similar to Lopez, *supra*. The evidence of record indicates that the Custodian provided to the Complainant an incomplete copy of page eight (8) of Record No. 2 because information was missing after year six (6). The evidence of record also indicates that page eight (8) contained information to year fifteen (15) of the program. The evidence of record also indicates

that as part of the SOI, Mr. Serio provided a copy of the full legal-size record for page eight (8). Furthermore, upon request from the GRC, Mr. Serio certified that Record No. 2 was originally on legal size paper. Mr. Serio also certified that when Record No. 2 was scanned, information was cut off at year six (6). Lastly, Mr. Serio certified that record No. 2 actually included fifteen (15) years of information. Thus, a complete version of Record No. 2 existed at the time of the Complainant's OPRA request.

Therefore, because the Custodian provided an incomplete copy of page eight (8) for Record No. 2, MHA 2009 Application, to the Complainant in response to his OPRA request when a complete record existed at the time of said request, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).

Whether the Complainant's request Item No. 2 is valid under OPRA?

OPRA provides that:

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

OPRA also provides that:

"government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, ... and any limitations on the right of access accorded by [OPRA] ... shall be construed in favor of the public's right of access[.]" 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.

In the instant complaint, the Complainant filed an OPRA request seeking "any and all letters and documents of support and/or approvals for the MHA proposed project of new construction at 354 Orange Road, Montclair, NJ." The Complainant's request for such records is overly broad because it fails to identify specific government records sought and is therefore 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 '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.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² 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."¹³

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

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, *supra*.

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 "any and all letters and documents of support and/or approvals for the CDBG/CHDO/HOME grant application for \$350,000 for MHA whether it be municipal, county, State, PHA, or PJ, HUD and/or any other approvals or letters of support for MHA proposed project of new construction at 354 Orange Road, Montclair, NJ" fails to specifically identify a government record. The Complainant does not identify the type of government record he is seeking, rather, the Complainant filed a blanket request for all documents relating to the proposed project. Furthermore, the Complainant's request would require the Custodian to research all of his files to determine which records are responsive to said request.

Therefore, because the Complainant's request Item No. 2 fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and 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).

Whether the Custodian's actions rise 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.

In the instant complaint, the Custodian’s response to the OPRA request failed to address the Complainant’s request Item No. 2. The Custodian also provided the Complainant with an incomplete copy of page eight (8) for Record No. 2, MHA 2009 Application, when there was a complete copy available. However, the Custodian provided the Complainant with a complete copy of that record with his SOI. Furthermore, the Complainant’s request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record sought and is overly broad and unclear.

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).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because he failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record. The Custodian also violated N.J.S.A. 47:1A-1 by initially providing the Complainant with an incomplete copy of page eight (8) to the MHA 2009 Application. However, the Custodian provided the Complainant with the full legal-size record of page eight (8) for Record No. 2 with the SOI. Furthermore, the Complainant’s request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record. 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. Although the Custodian’s response was timely, he failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and

Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. Because Mr. Serio certified in the Statement of Information that the records provided to the Complainant were not altered in any way and that the records were scanned into the OnBase document management system and that the Division used this system to retrieve said records to provide to the Complainant, the Council has no authority over the condition of records sent by the Custodian of Records pursuant to N.J.S.A. 47:1A-7.b., Toscano v. NJ Dep't of Labor, GRC Complaint No. 2005-59 (September 2005); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003). *See also* Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because the Custodian provided an incomplete copy of page eight (8) for Record No. 2, MHA 2009 Application, to the Complainant in response to his OPRA request when a complete record existed at the time of said request, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-1 and Lopez v. County of Hudson, GRC Complaint No. 2009-267 (March 2011).
4. Because the Complainant's request Item No. 2 fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and 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).
5. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because he failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record. The Custodian also violated N.J.S.A. 47:1A-1 by initially providing the Complainant with an incomplete copy of page eight (8) to the MHA 2009 Application. However, the Complainant's request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record. Furthermore, the Custodian provided the Complainant with the full legal-size record of page eight (8) for Record No. 2 with the SOI. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Case Manager

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Executive Director

April 18, 2012