



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-196

v.

Township of Downe (Cumberland)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 Supplemental 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 that this complaint be dismissed as part of a stipulation of settlement signed by the Custodian’s Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013. Therefore, no further adjudication is required.

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 June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-196

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint: On-site inspection of the following:

1. All meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.
2. Contracts and all accompanying documents between Downe Township and Kay & Associates, Inc., regarding the re-evaluation project.
3. All valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures.

Request Made: July 2, 2010

Response Made: July 6, 2010

GRC Complaint Filed: August 3, 2010³

Background

April 25, 2012 Council Meeting:

At its April 25, 2012 public meeting, the Council considered the April 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide the GRC with a detailed list of all the agendas responsive that were provided to the Complainant for an on-site inspection, a legal certification that the agendas provided to the Complainant are the only agendas responsive to request Item No. 1, or certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, and has failed to provide

¹ No legal representation listed on record.

² Richard DeVillasanta, Custodian of Records. Represented by John G. Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

nine (9) copies of the unredacted records responsive to request Item No. 3 for an *in camera* review, the Custodian has failed to comply with the terms of the Council's February 28, 2012 Interim Order.

2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 1 and is also unable to determine whether the records responsive to request Item No. 3 are exempt from disclosure under OPRA because they contain advisory, consultative or deliberative material. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures responsive to request Item No. 3 to determine if said records are exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Procedural History:

On April 27, 2012, the Council distributed its Interim Order to all parties. On October 25, 2012, this complaint was transmitted to the Office of Administrative Law ("OAL"). On May 29, 2013, OAL transmitted this complaint back to the GRC marked as withdrawn pursuant to a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed as part of a stipulation of settlement signed by the Custodian's Counsel on May 9, 2013, and signed by the Complainant on May 13, 2013. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-196

v.

Township of Downe (Cumberland)
Custodian of Record

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

1. Because the Custodian failed to provide the GRC with a detailed list of all the agendas responsive that were provided to the Complainant for an on-site inspection, a legal certification that the agendas provided to the Complainant are the only agendas responsive to request Item No. 1, or certified confirmation of compliance with the Council’s Order in accordance with N.J. Court Rule 1:4-4, and has failed to provide nine (9) copies of the unredacted records responsive to request Item No. 3 for an *in camera* review, the Custodian has failed to comply with the terms of the Council’s February 28, 2012 Interim Order.
2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 1 and is also unable to determine whether the records responsive to request Item No. 3 are exempt from disclosure under OPRA because they contain advisory, consultative or deliberative material. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures responsive to request Item No. 3 to determine if said records are exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.



Interim Order 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**

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

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-196

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint: On-site inspection of the following:

1. All meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.
2. Contracts and all accompanying documents between Downe Township and Kay & Associates, Inc., regarding the re-evaluation project.
3. All valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures.

Request Made: July 2, 2010

Response Made: July 6, 2010

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010³

Background

February 28, 2012

Government Records Council's ("Council") Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian responded to the Complainant's OPRA request within the seven (7) business days, said response was not in writing. 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., DeLuca v. Town of Guttenberg

¹ No legal representation listed on record.

² Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

(Hudson), GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Moreover, because the Custodian failed to immediately grant or deny access to the contract responsive to request Item No. 2, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).

2. The Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 1, all meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. The Custodian must also provide to the Council a detailed list of all agendas that were provided to the Complainant and certify that the agendas provided are the only agendas that are responsive to the request and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. Because the Complainant's request for "accompanying documents" responsive to request Item No. 2 fails to identify a specific government record and would require the Custodian to conduct research, such request 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures to determine the validity of the Custodian's assertion that these records contain advisory, consultative and

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

6. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #5 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ that the records provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

February 29, 2012

Council's Interim Order distributed to the parties.

March 20, 2012

E-mail from the Custodian to the Complainant.⁹ The Custodian asks the Complainant when she would like to come to the Custodian's office to view the agendas responsive to request Item No. 1.

March 26, 2012

E-mail from the Custodian to the Complainant.¹⁰ The Custodian attaches a list of the Planning/Zoning Board Committee meeting agendas responsive to request Item No. 1 and a list of the Township Committee agendas from January 2007 through July 2010. The Custodian states that the Complainant conducted an on-site inspection of the Planning/Zoning Board Committee meeting agendas on March 22, 2012. The Custodian states that if the Complainant wishes to view the Township Committee agendas from January 2007 through July 2010, she should inform the Custodian.

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ The Custodian e-mails the Complainant nineteen (19) business days after receipt of the Council's Interim Order.

¹⁰ The Custodian does not include the required legal certification, certifying that the agendas provided are the only agendas responsive to the request.

Analysis

Whether the Custodian complied with the Council's February 28, 2012 Interim Order?

The Council's February 28, 2012 Interim Order required the Custodian to 1) make available to the Complainant an on-site inspection of all of the meeting agendas that exist responsive to request Item No. 1; 2) provide a detailed list of all agendas that were provided pursuant to the on-site inspection are provided to the Complainant and certify that the agendas provided are the only agendas responsive to the request in accordance with N.J. Court Rule 1:4-4, and 3) deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records of the "valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures" for an *in camera* inspection, as well as a legal certification that the records provided are the documents requested by the Council. The Council's Order required the Custodian to comply within five (5) business days from receipt of said Interim Order.

The evidence of record reflects that the Custodian only made available to the Complainant the records responsive to request Item No. 1 for an on-site inspection. However, the Custodian made these records available nineteen (19) business days following receipt of Council's Interim Order. Moreover, the Custodian failed to provide the GRC with a detailed list of all the agendas responsive to the request that were provided to the Complainant, a legal certification from the Custodian certifying that the agendas provided to the Complainant are the only agendas responsive to request Item No. 1, or a certification of compliance in accordance with N.J. Court Rule 1:4-4. Furthermore, the Custodian failed to provide to the GRC the unredacted records responsive to request Item No. 3 for an *in camera* review.

Therefore, because the Custodian failed to provide the GRC with a detailed list of all the agendas responsive that were provided to the Complainant for an on-site inspection, a legal certification that the agendas provided to the Complainant are the only agendas responsive to request Item No. 1, or certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, and has failed to provide nine (9) copies of the unredacted records responsive to request Item No. 3 for an *in camera* review, the Custodian has failed to comply with the terms of the Council's February 28, 2012 Interim Order.

Therefore, the GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 1 and is also unable to determine whether the records responsive to request Item No. 3 are exempt from disclosure under OPRA because they contain advisory, consultative or deliberative material. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures responsive to request Item No. 3 to determine if said records are exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative or

deliberative material. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. Because the Custodian failed to provide the GRC with a detailed list of all the agendas responsive that were provided to the Complainant for an on-site inspection, a legal certification that the agendas provided to the Complainant are the only agendas responsive to request Item No. 1, or certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, and has failed to provide nine (9) copies of the unredacted records responsive to request Item No. 3 for an *in camera* review, the Custodian has failed to comply with the terms of the Council's February 28, 2012 Interim Order.
2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 1 and is also unable to determine whether the records responsive to request Item No. 3 are exempt from disclosure under OPRA because they contain advisory, consultative or deliberative material. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures responsive to request Item No. 3 to determine if said records are exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material. Furthermore, the Office of Administrative Law should determine if the Custodian knowingly and willfully violated OPRA if he unlawfully denied access to the requested records.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-196

v.

Township of Downe (Cumberland)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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. Although the Custodian responded to the Complainant's OPRA request within the seven (7) business days, said response was not in writing. 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., DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Moreover, because the Custodian failed to immediately grant or deny access to the contract responsive to request Item No. 2 request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 1, all meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. The Custodian must also provide to the Council a detailed list of all agendas that were provided to the Complainant and certify that the agendas provided are the only agendas that are responsive to the**



request and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

4. Because the Complainant's request for "accompanying documents" responsive to request Item No. 2 fails to identify a specific government record and would require the Custodian to conduct research, such request 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures to determine the validity of the Custodian's assertion that these records contain advisory, consultative and deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
6. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #5 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-196

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint: On-site inspection of the following:

1. All meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010
2. Contracts and all accompanying documents between Downe Township and Kay & Associates, Inc., regarding the re-evaluation project
3. All valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures.

Request Made: July 2, 2010

Response Made: July 6, 2010

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010³

Background

July 2, 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 6, 2010

Custodian's response to the OPRA request.⁴ The Custodian verbally responds to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that he will begin fulfilling the OPRA request on July 8, 2010 or July 9, 2010. The Custodian states that access to the contract responsive to request Item No. 2 is denied based on advice from counsel that such contract is not disclosable.

¹ No legal representation listed on record.

² Represented by John Carr, Esq., of Cresse & Carr (Woodbury, NJ).

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

⁴ The evidence of record indicates that the Complainant initiated this telephone call to ascertain whether the Custodian had received the instant OPRA request.

July 16, 2010

Complainant visits the Custodian's office to inspect the agendas responsive to request Item No. 1.⁵

July 22, 2010

Telephone call from the Custodian to the Complainant. The Custodian informs the Complainant that he needs to obtain the records responsive for request Item No. 3 from Ms. Doris Sanza, Tax Assessor, ("Ms. Sanza").

July 23, 2010

Telephone call from the Complainant to the Custodian. The Complainant requests that the Custodian provide her with the status of her OPRA request in writing because she will be filing a Denial of Access Complaint with the Government Records Council ("GRC").

July 26, 2010

E-mail from Ms. Sanza to the Custodian. Ms. Sanza states that that the records responsive to request Item No. 3 are exempt from disclosure under OPRA as advisory, consultative and deliberative ("ACD") material. Ms. Sanza also states that the Custodian should obtain advice from Custodian's Counsel on this matter. Ms. Sanza further states that she spoke with the County Board of Taxation ("Board") and the Board agrees with her decision.⁶

July 27, 2010

Telephone call from the Custodian to the Complainant. The Custodian states that access to the records responsive to request Item No. 3 is denied because such records are considered ACD material exempt from disclosure under OPRA.

August 3, 2010

Denial of Access Complaint filed with the GRC with the following attachments:⁷

- Complainant's OPRA request dated July 2, 2010⁸
- E-mail from Ms. Sanza to the Custodian dated July 26, 2010.

The Complainant states that she has encouraged the Custodian several times to contact the GRC for guidance regarding those request items which the Custodian contends are not disclosable under OPRA. The Complainant states that the Custodian was working for the Township for only four (4) weeks when she filed her OPRA request. The Complainant also states that after the Custodian informed her several times that he

⁵ The Custodian certified that the Complainant reviewed the records responsive to request Item No. 1 on July 2, 2010. The Complainant states in the Denial of Access Complaint that the Custodian handed her several binders to inspect and further states that the agendas responsive to request Item No. 1 were not in the binders.

⁶ The Complainant received a copy of this e-mail on July 29, 2010.

⁷ The Complainant attaches four (4) additional Denial of Access Complaints against the Township, which are being adjudicated separately.

⁸ The Complainant also attaches a copy of her OPRA request with the Custodian's notations dated July 23, 2010.

had to look in the storage area for the records responsive and that he must check with Custodian's Counsel or Ms. Sanza as to which records were disclosable, she asked for the status of her complaint in writing on July 23, 2010. The Complainant states that she informed the Custodian multiple times that verbal communications regarding this request were unacceptable under OPRA.

The Complainant states that she believes the Township is not cooperating with her OPRA request because she appealed her property taxes at the county and State level. The Complainant also asserts that the trial in state tax court regarding such appeal is scheduled for September 8, 2010. The Complainant states that the Township was ordered by the court to provide certain records pursuant to discovery and to answer certain questions. The Complainant asserts that the Township did not provide such records and did not answer such questions. The Complainant also argues that the records requested herein will provide her with the information needed to support her claims and prepare her case for tax court. The Complainant further argues that the Township's belief that it can withhold certain records until after trial amounts to a knowing and willful violation of OPRA. The Complainant requests that the GRC order the Custodian to disclose the requested records. The Complainant also requests that if the Custodian has knowingly and willfully violated OPRA, he should be fined. Lastly, the Complainant requests that the GRC develop and monitor a corrective action plan for the Township with specific attention to the Custodian's responsibilities and the handling of and responding to OPRA requests.

Request Item No. 1: meeting agendas of the Planning/Zoning Board Township Committee from January, 2007 through July, 2010

The Complainant states that at some time prior to July 14, 2010, the Custodian informed her that he had some of the records responsive and requested that she come to the office on July 16, 2010 to inspect the records.⁹ The Complainant also states that she went to the Custodian's office on July 16, 2010 and was handed several binders to inspect. The Complainant further states that the agendas responsive to the request were not in the binder. The Complainant states that she encouraged the Custodian to ask the Planning/Zoning Board Township Committee for the responsive agendas. The Complainant also states that if these agendas were prepared by the former Custodian then perhaps the Custodian could access those records. In addition, the Complainant states that the Custodian informed her that he was looking for the agendas responsive. Lastly, the Complainant states that on July 23, 2010 after informing the Custodian that she would have to file a Denial of Access Complaint, she requested that the Custodian provide her with the status of the OPRA request in writing. The Complainant states that the Custodian noted on the OPRA request form that he needed additional time to locate the records.

⁹ The Complainant also requested Planning/Zoning Board minutes, which are not relevant to the adjudication of this complaint.
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Request Item No. 2: contracts and all accompanying documents between Downe Township and Kay & Associates, Inc., regarding the re-evaluation project

The Complainant states that she contacted the Custodian via telephone on or about July 6, 2010 to make sure that he received her OPRA request. The Complainant also states that the Custodian informed her in that conversation that he would begin working on the OPRA request on July 8, 2010 or July 9, 2010. The Complainant also states that the Custodian denied her access to the requested contracts because the Custodian's Counsel said they were not disclosable. Lastly, the Complainant states that she received a copy of a responsive contract on July 14, 2010 but no other records responsive to request Item No. 2. The Complainant argues that she is certain that Custodian's Counsel and the Custodian know that the contracts responsive to request Item No. 2 are public records.

Request Item No. 3: all valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures

The Complainant states that at some time after the seven (7) business day deadline to respond had elapsed, the Custodian informed her that he would have to check with Ms. Sanza to see if the requested records are disclosable. The Complainant also states that on July 22, 2010 the Custodian informed her that he would have to obtain these records from Ms. Sanza. The Complainant further states that she contacted the Custodian on July 23, 2010, at which time the Custodian stated that Ms. Sanza had informed him that the records were not disclosable. The Complainant states that she informed the Custodian that he must provide a specific lawful basis for the denial of access. The Complainant states that she informed the Custodian that she would file a Denial of Access Complaint if she did not receive the records or a reason stating why access was denied. The Complainant also states that the Custodian contacted her on July 27, 2010 and stated that Ms. Sanza informed him that access to the records was denied because they are ACD material pursuant to N.J.S.A. 47:1A-1.

The Complainant does not agree to mediate this complaint.

August 3, 2010

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

August 9, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation requesting a five (5) business day extension to complete the SOI.

August 13, 2010

E-mail from the GRC to the Custodian. The GRC states that one (1) additional extension to complete the SOI will be granted. The GRC also states that the SOI must be submitted by August 27, 2010.

August 27, 2010¹⁰

Custodian's incomplete SOI.¹¹

The Custodian argues that the Complainant was not denied access to any records. The Custodian certifies that he was new to the Municipal Clerk's position at the time the Complainant filed her OPRA request. The Custodian also certifies that the Township is extremely small with a population of less than 2,000 people. The Custodian further certifies that he is the only full time employee in the office from Mondays through Wednesdays. The Custodian additionally certifies that Ms. Sanza is a part-time employee with the Township and has office hours from 10:00 a.m. to 6:00 p.m. on Thursdays.

The Custodian certifies that the Complainant requested several records and that he cooperated with her requests. The Custodian certifies that he was unfamiliar with the immediate location of some of the records since he was relatively new to the Clerk's position. The Custodian further certifies that some of the records requested were not immediately available because they needed to be retrieved from Ms. Sanza, who is only in the office from 10:00 a.m. to 6:00 p.m. on Thursdays. The Custodian certifies that at the time of the Complainant's request, the Township was in the process of inventorying its records and thus some records were not readily accessible. The Custodian also certifies that he informed the Complainant of Ms. Sanza's hours and of the ongoing records inventory. The Custodian further certifies that he explained to the Complainant that he was not intentionally withholding records and his office was complying with her OPRA request as quickly and efficiently as possible.

The Custodian certifies that that he was able to locate the agendas for the Planning/Zoning Township Committee and that he provided the Complainant with the agendas responsive to request Item No. 1. The Custodian also certifies that he provided the Complainant with a copy of the contract responsive to request Item No. 2. Lastly, the Custodian certifies that Ms. Sanza responded to the Complainant separately regarding request Item No. 3.

August 30, 2010

Letter from the GRC to the Custodian. The GRC states that that the Custodian's SOI is incomplete and is being returned to him for completion. The GRC states that the Custodian must complete pages three (3) and four (4) of the SOI form and provide a copy of the Complainant's OPRA request and the Custodian's response to the OPRA request. Lastly, the GRC states that the completed SOI must be submitted by September 2, 2010.

September 3, 2010

Facsimile from the Custodian to the GRC. The Custodian provides a copy of the Complainant's OPRA request dated July 2, 2010. The Custodian certifies that the records search was difficult because he was the only person in the office and was not

¹⁰ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to *Paff v. NJ Department of Labor*, 392 N.J. Super. 334 (App. Div. 2007).

¹¹ The Custodian attaches additional materials which are not relevant to the adjudication of this complaint. *Mary Steinhauer-Kula v. Township of Downe (Cumberland)*, 2010-196 – Findings and Recommendations of the Executive Director

familiar with the file system. The Custodian also certifies that the records responsive to the Complainant's OPRA request have not been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on July 2, 2010. The Custodian also certifies that on July 2, 2010 the Complainant reviewed the records in the Township Office lobby.¹²

December 2, 2011

E-mail from the GRC to the Custodian. The GRC states that upon reviewing the complaint and the SOI, it is unclear when the Custodian responded to the Complainant's OPRA request. The GRC requests that the Custodian provide in a legal certification the date that the Custodian responded to the Complainant's OPRA request and in the manner in which he responded. The GRC also requests that if the Custodian's response was written, he should provide a copy of that correspondence. The GRC further states that the Custodian must provide the legal certification within five (5) business days.

December 7, 2011

E-mail from the Custodian to the GRC. The Custodian states that he arranged a meeting with Custodian's Counsel on December 9, 2011 to respond to the GRC's request for a legal certification.

December 14, 2011

E-mail from the Custodian to the GRC attaching the Custodian's legal certification.¹³ The Custodian certifies that the Complainant conducted an on-site inspection of the meeting agendas responsive to request Item No. 1.¹⁴ The Custodian also certifies that the Complainant conducted an on-site inspection of the contract and accompanying records responsive to request Item No. 2 on or about July 23, 2010. The Custodian further certifies that the Complainant conducted an inspection of all valuation formulas and procedures responsive to request Item No. 3 on or about July 22, 2010.

January 9, 2012

E-mail from the GRC to Custodian's Counsel. The GRC informs Counsel that after review of the complaint and the SOI, it is unclear as to the specific date when the Custodian initially responded to the OPRA request. The GRC requests a legal certification from the Custodian as to the specific date and in what format he responded to each of the Complainant's OPRA request items. The GRC also states that it is not necessary to provide the dates that the records were made available for inspection to the Complainant. The GRC requests that the legal certification be submitted within three (3) business days.

¹² The Custodian does not certify which records responsive the Complainant reviewed. The Complainant asserts that she reviewed the records responsive to request Item No. 1 on July 16, 2010.

¹³ The Custodian does not certify as to when he responded to the Complainant's OPRA request.

¹⁴ The Custodian does not certify as to when the Complainant conducted an on-site inspection.

January 12, 2012

E-mail from the Custodian to the GRC, attaching the document index from the SOI with the Custodian's notations thereon. The Custodian states that he provided the Complainant with the agendas responsive for request Item No. 1. The Custodian also states that he provided the Complainant with an on-site inspection of the contract responsive to request Item No. 2 on July 19, 2010.¹⁵ The Custodian further states that Ms. Sanza responded separately to request Item No. 3 on July 22, 2010.

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

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 provides that:

"[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5.e.

OPRA also provides that:

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

Further, OPRA provides that:

¹⁵ The Custodian certified on December 14, 2011 that the Complainant conducted an on-site inspection of the contract responsive to request Item No. 2 on July 23, 2010, not July 19, 2010.
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“[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 mandates that a custodian must either grant or deny access to requested records in writing 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.¹⁶ 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 (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In a matter with a similar fact pattern to the instant complaint, DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council’s decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).”

The immediate disclosure of records was discussed in Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007), wherein the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when

¹⁶ 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.

immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant complaint, the Custodian verbally responded to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The evidence of record indicates that the Custodian stated that he would begin fulfilling the OPRA request on July 8, 2010 or July 9, 2010. The evidence of record also indicates that access to the contract responsive to request Item No. 2 was denied based on advice from counsel that such contracts are not disclosable. The evidence of record further indicates that the Custodian did not provide for a lawful basis for a denial. In addition, the evidence of record indicates that the Custodian did not address the Complainant's request Item No. 1 or No. 3.

Although the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. 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., DeLuca, supra and Kelley, supra. Moreover, because the Custodian failed to immediately grant or deny access to the contracts responsive to request Item No. 2, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).

Whether the Custodian unlawfully denied access to the agendas responsive to request Item No. 1?

In the instant complaint, the Complainant asserted in her Denial of Access Complaint that she went to the Custodian's office on July 16, 2010 to conduct an on-site inspection of the agendas responsive to request Item No. 1. The Complainant asserted that the Custodian handed her several binders to look through; however, the requested agendas were not in the binder. Conversely, the Custodian certified in the SOI that he provided the Complainant with said agendas. However, the Custodian did not certify as to what date he provided the agendas. Furthermore, on September 3, 2010 the Custodian certified that the Complainant conducted an on-site inspection of records on July 2, 2010. Again, the Custodian did not certify as to which records he provided for an onsite inspection. In addition, the Custodian certified on December 14, 2011 that the Complainant conducted an on-site inspection of the agendas responsive to request Item No. 1. However, the Custodian did not certify as to when the Complainant conducted the on-site inspection.

Although the evidence of record is unclear as to the date of the Complainant's inspection of records, the parties agree that an inspection of some records occurred. Notably, the Custodian certified that he provided the Complainant access to records responsive to request Item No. 1 on July 2, 2010. However, the evidence of record indicates that the Complainant conducted an on-site inspection on July 16, 2010.

Furthermore, the record is not clear as to the specific records which the Custodian provided to the Complainant for her inspection. Thus, the Custodian failed to bear his burden of proving which records he provided to the Complainant. N.J.S.A. 47:1A-6.

Therefore, the Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 1, *i.e.*, all meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.

Whether the Complainant’s request for “accompanying documents” to the contracts responsive to request Item No. 2 is valid 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),¹⁷ 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

¹⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
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with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”¹⁸

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).”

In the instant complaint, the Complainant requested an on-site inspection of contracts *and all accompanying documents* between Downe Township and Kay & Associates, Inc., regarding the re-evaluation project in response to request Item No. 2. The Complainant asserted that she conducted an on-site inspection of the contract responsive to request Item No. 2, but no other records responsive to this request item were provided. However, the Complainant’s request for “all other accompanying documents” does not identify what type of government record the Complainant is seeking. Rather, the Complainant makes a blanket request for all records. Furthermore, the Custodian would have to conduct research, not merely search, for the records are responsive to the Complainant’s request.

Therefore, because the Complainant’s request for “accompanying documents” to the contracts responsive to request Item No. 2 fails to identify a specific government record and would require the Custodian to conduct research, such request 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

¹⁸ As stated in Bent, *supra*.

Whether the records responsive to request Item No. 3 are exempt from disclosure under OPRA as advisory, consultative and deliberative material?

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁹ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

In the instant complaint, the Custodian asserted that the records responsive to request Item No. 3 are exempt from disclosure under OPRA as ACD material. Although the Custodian certified that the Complainant conducted an on-site inspection of the records responsive to request Item No. 3 on July 22, 2010, the Complainant asserted that the Custodian contacted her on July 27, 2010 and stated that Ms. Sanza informed him that access to these records was denied because they are ACD material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian failed to bear his burden of proving that he actually provided the requested records to the Complainant.

¹⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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Therefore, pursuant to Paff, supra, the GRC must conduct an in-camera review of the valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures to determine the validity of the Custodian's assertion that these records contain ACD information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

Whether the GRC has the authority under OPRA to establish and/or monitor a corrective action plan for the Township?

OPRA provides that the Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied. N.J.S.A. 47:1A-7.b

N.J.S.A. 47:1A-7.b delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints filed under OPRA.

In this complaint, the Complainant requested that the GRC develop and monitor a corrective action plan for the Township, with specific attention to the Custodian's responsibilities and the handling of and responding to OPRA requests.

The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council

with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.

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?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded to the Complainant's OPRA request within the seven (7) business days, said response was not in writing. 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., DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Moreover, because the Custodian failed to immediately grant or deny access to the contract responsive to request Item No. 2 request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 1, all meeting agendas of the Planning/Zoning Board Township Committee from January 2007 through July 2010.
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. The Custodian must also provide to the Council a detailed list of all agendas that were provided to the Complainant and certify that the agendas provided are the only agendas that are responsive to the request and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,²⁰ to the Executive Director.²¹**

²⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

²¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold *Mary Steinhauer-Kula v. Township of Downe (Cumberland)*, 2010-196 – Findings and Recommendations of the Executive Director 14

4. Because the Complainant's request for "accompanying documents" responsive to request Item No. 2 fails to identify a specific government record and would require the Custodian to conduct research, such request 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the valuation formulas and procedures used to determine the current market property values used in the 2009 assessment along with recent sales used to develop the formulas and procedures to determine the validity of the Custodian's assertion that these records contain advisory, consultative and deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
6. **The Custodian must deliver²² to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #5 above), a document or redaction index²³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,²⁴ that the records provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council does not have the authority under OPRA to establish a corrective action plan as requested by the Complainant. Thus, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Harlyne A. Lack, Esq.
Case Manager

delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

²² The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

²³ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

²⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012