



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

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-198

v.

Township of Downe (Cumberland)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that no surety bond exists and because the Complainant has submitted no competent, credible evidence to refute the Custodian’s certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested surety bond pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant’s request for the records 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).
4. The Council does not have the authority under OPRA to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.



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 respond to the Complainant's OPRA request. However, the surety bond responsive to request Item No. 1 does not exist. Furthermore the Complainant's request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record and would require the Custodian to conduct research. 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-198

v.

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

Records Relevant to Complaint: Copies of the following records:

1. Surety bond for re-evaluation project
2. Proof of submission to the NJ Department of Treasury, Division of Taxation, for the surety bond with the required thirty (30) day period for January 4, 2008 letter granting conditional approval of contract.

Request Made: July 14, 2010

Response Made: None

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010³

Background

July 14, 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 23, 2010

Complainant's visit to the Custodian's Office. The Complainant requests that the Custodian provide her with a written status concerning her OPRA request because she will be filing a Denial of Access Complaint with the Government Records Council ("GRC"). The Custodian states he is unable to locate the records responsive. The Custodian also states that he will continue to search for the records and check with Ms. Doris Sanza, Tax Assessor, ("Ms. Sanza") as to the location of the records requested.⁴

July 26, 2010

E-mail from Ms. Sanza to the Custodian. Ms. Sanza states that in lieu of the surety bond responsive to request Item No. 1, the Township Committee accepted a letter

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 Complaints on said date.

⁴ The Custodian noted on the Complainant's OPRA request form, "as of date unable to produce, will continue to search and talk with assessor," in response to request Item No. 1.

of credit from the company selected to perform the re-evaluation project. Ms. Sanza also states that she does not have a copy of this letter of credit in her office but it is normally filed with the Township Finance Officer. Ms. Sanza further states that the letter of credit would be exempt from disclosure as a trade secret and proprietary, commercial or financial information.

July 27, 2010

Telephone call from the Custodian to the Complainant. The Custodian states that there is no surety bond responsive to request Item No. 1. The Custodian also states that Ms. Sanza informed him that a letter of credit exists in lieu of the surety bond. The Custodian further states that the letter of credit is not disclosable because it is considered a trade secret and proprietary commercial or financial information which is exempt from OPRA pursuant to N.J.S.A. 47:1A-1.1.

August 3, 2010

Denial of Access Complaint filed with the GRC with the following attachments:⁵

- Complainant's OPRA request dated July 14, 2010⁶
- E-mail from Ms. Sanza to the Custodian dated July 26, 2010.

The Complainant states that she has often encouraged the Custodian to contact the GRC regarding those request items which the Custodian claims are not disclosable under OPRA. The Complainant states that the Custodian had worked for the Township for only four (4) weeks when she filed her OPRA requests. The Complainant also states that after the Custodian informed her several times that he had to search for the records responsive and check with Ms. Sanza about which records were disclosable, she asked for the status of her complaints in writing. The Complainant states that she informed the Custodian multiple times that verbal responses and denials of access to records were unacceptable under OPRA.

The Complainant asserts that she believes the Township is not cooperating with her OPRA requests is because she appealed her property taxes at the county level and to the State. The Complainant also asserts that the trial in State tax court is scheduled for September 8, 2010. The Complainant states that the Township was ordered to provide discovery on certain items and answer certain questions. The Complainant asserts that the Township did not provide certain records and did not answer some questions. The Complainant also asserts that the information requested will provide her with the information she needs to support her claims and prepare her case. The Complainant further argues that she believes the Township intends to withhold certain records until after trial, which 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 the GRC fine if the Custodian if he is found to have

⁵ The Complainant encloses a copy of the letter of credit responsive to request Item No. 2 with her Denial of Access Complaint

⁶ The Complainant also attaches a second (2nd) copy of her OPRA request with the Custodian's notations thereon dated July 23, 2010.

knowingly and willfully violated OPRA. Lastly, the Custodian requests that a corrective action plan for the Township be developed and monitored by the GRC.

Request Item No. 1, Surety bond for re-evaluation project:

The Complainant states that she telephoned the Custodian on July 23, 2010 and the Custodian informed her that they did not have any of the requested records. The Complainant also states that she asked the Custodian if the surety bond exists and the Custodian stated he would have to check. The Complainant further states that the Custodian telephoned her on July 27, 2010 and said that Ms. Sanza informed him that a letter of credit exists in lieu of the surety bond, but that said letter of credit is not disclosable under OPRA because it is considered a trade secret and proprietary commercial or financial information pursuant to N.J.S.A. 47:1A-1.1.⁷

The Complainant states that a copy of the re-evaluation contract and approval letter from the NJ Department of Treasury were previously obtained through a separate OPRA request not at issue herein. The Complainant also states that this approval letter gave conditional approval for the contract on the condition that a surety bond was forwarded to the NJ Department of Taxation within thirty (30) days or the contract would be rendered invalid. The Complainant argues that the surety bond responsive to request Item No. 1 must exist because the re-evaluation was conducted by Kay & Associates and there should be a record of the surety bond being sent to the NJ Department of Treasury. The Complainant argues that this was a public dealing contract with the Township and the surety bond was a requirement of the bid, therefore it should not be considered a trade secret.

The Complainant states that on July 23, 2010, she went to the Custodian's office and asked that he provide her a written status of her OPRA request. The Complainant also states that on July 23, 2010 the Custodian wrote on the OPRA request "as of date unable to produce, will continue to search and talk with assessor."

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) more extension to complete the SOI will be granted. The GRC also states that the SOI must be submitted by August 27, 2010.

⁷ The Custodian certified on September 3, 2010 that the letter of credit in lieu of the surety bond was provided on July 14, 2010. The Custodian also certified on December 14, 2011 that he provided the Complainant with a copy of the letter of credit on July 23, 2010.

August 27, 2010⁸

Custodian's incomplete SOI.⁹

The Custodian argues that he did not deny the Complainant access to any records. The Custodian certifies that he was new to the Municipal Clerk's position at time the Complainant filed her OPRA request. The Custodian also certifies that Downe 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, with office hours from 10:00 a.m. to 6:00 p.m. on Thursdays.

The Custodian argues that the Complainant requested several records and he cooperated with her requests. The Custodian also argues 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 needed to be retrieved from Ms. Sanza and were not immediately accessible because Ms. Sanza's hours are only 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 records inventory. The Custodian further certifies that he explained to the Complainant that no records were intentionally withheld from her and his office was complying with her OPRA request as quickly and efficiently as possible.

The Custodian certifies that he provided the Complainant with a copy of the letter of credit in lieu of the surety bond sought pursuant to request Item No. 1. The Custodian also certifies that he is unaware of any records responsive to request Item No. 2. The Custodian further certifies that any correspondence pertaining to the surety bond would have originated from the Finance Officer or the Custodian. The Custodian additionally certifies that Ms. Sanza would not be involved in financial matters pertaining to the re-evaluation contract.

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 also 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. The GRC further states that the Custodian's cover letter will be used as Item No. 12. Lastly, the GRC states that the completed SOI must be submitted by September 2, 2010.

⁸ 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).

⁹ The Custodian attaches additional material which is not relevant to the adjudication of this complaint. Mary Steinhauer-Kula v. Township of Downe (Cumberland), 2010-198 – Findings and Recommendations of the Executive Director

September 3, 2010

Facsimile from the Custodian to the GRC. The Custodian attaches the Complainant's OPRA request dated July 14, 2010.

The Custodian certifies that the records search was difficult because he was the only person in the office and was not 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 the Complainant received a copy of the letter of credit instead of the surety bond responsive to request Item No. 1 on July 14, 2010.

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 the Custodian to provide in a legal certification format 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 the Custodian provide a copy of said response, if such response was made in writing. The GRC further requests the Custodian to submit 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 requested legal certification.

December 14, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification.¹⁰ The Custodian certifies that no surety bond exists which is responsive to request Item No. 1. The Custodian also certifies that the Complainant was provided a copy of the letter of credit which exists in lieu of the surety bond on July 23, 2010.¹¹

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 request. The GRC requests a legal certification from the Custodian as to the specific date and in what format he responded to the Complainant's OPRA request. The GRC also states that it is not necessary to state when the records were provided to the Complainant. The GRC requests that the legal certification be provided within three (3) business days.

January 12, 2012

E-mail from the Custodian to the GRC. The Custodian attaches the document index from the SOI with the Custodian's notations thereon. The Custodian states that he

¹⁰ The Custodian does not certify as to when he responded to the Complainant's OPRA request.

¹¹ The Custodian certified on September 3, 2010 that he provided a copy of the letter of credit on July 14, 2010.

provided the Complainant with a copy of the letter of credit which exists in lieu of the surety bond responsive to request Item No. 1. The Custodian also states that he is unaware of the existence of any records responsive to request Item No. 2. The Custodian further states that any correspondence pertaining to the surety bond requested would have originated from the Finance Officer or the Custodian, not Ms. Sanza. The Custodian additionally states that Ms. Sanza would not be involved in financial matter pertaining to the re-evaluation contract.

Analysis

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

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.

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹² Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹² 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.

In the instant complaint, there is no evidence on record as to when the Custodian responded to the Complainant's OPRA request. The evidence of record indicates that the GRC requested on four (4) separate occasions that the Custodian to legally certify when he initially responded to the Complainant's OPRA request. The evidence of record also indicates that the Custodian failed to provide any evidence as to when he responded to the Complainant's OPRA request. In addition, the Complainant offered no evidence to show when the Custodian responded to her OPRA request.

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

Whether the "surety bond for the re-evaluation project" responsive to request Item No. 1 exists?

In the instant complaint, the Complainant asserted in her Denial of Access Complaint that an approval letter gave conditional approval for the re-evaluation contract on the condition that a surety bond would be forwarded to the NJ Department of Taxation within thirty (30) days or the contract would be rendered invalid. The Complainant also asserted that the surety bond must exist because the re-evaluation was conducted by Kay & Associates and there would be a record of the surety bond being sent to the NJ Department of Treasury.

Conversely, the Custodian informed the Complainant that a letter of credit exists in lieu of the requested surety bond. The Custodian also certified in the SOI that he provided a copy of such letter to the Complainant. The Custodian further certified on September 3, 2010 that he provided a copy of the letter of credit on July 14, 2010. The Custodian additionally certified on December 14, 2011 that he provided a copy of the letter of credit which exists in lieu of the surety bond to the Complainant on July 23, 2010. Lastly, the Custodian certified on December 14, 2011 that no surety bond exists in response to request Item No. 1. Furthermore, the Complainant has submitted no competent, credible evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified that no surety bond exists and because the Complainant has submitted no competent, credible evidence to refute the Custodian's certification, the Custodian has borne his burden of proving that he did not unlawfully

deny access to the requested surety bond pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Whether the Complainant's request for 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),¹³ 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."¹⁴

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

¹³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁴ As stated in Bent, *supra*.

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 “proof of submission to the NJ Department of Treasury, Division of Taxation, for the surety bond with the required thirty (30) day period for January 4, 2008 letter granting conditional approval of the contract” in request Item No. 2. The Custodian certified that he is unaware of any records responsive to request Item No. 2. However, the Complainant’s request for Item No. 2 does not identify what type of government record the Complainant is seeking. 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 the records 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).

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

Whether the Custodian's failure to properly respond to the Complainant's OPRA request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

In the instant complaint, the Custodian failed to provide any evidence as to when he responded to the Complainant's OPRA request. The Custodian also failed to answer any of the GRC's requests for legal certification as to when he responded to said OPRA request. However, the Complainant's request for Item No. 2 is invalid under OPRA because it fails to specifically identify a government record and would require the Custodian to conduct research. Furthermore, the Custodian certified that a surety bond does not exist in response to request Item No. 1.

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 respond to the Complainant's OPRA request. However, the surety bond responsive to request Item No. 1 does not exist. Furthermore the Complainant's request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record and would require the Custodian to conduct research. 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian certified that no surety bond exists and because the Complainant has submitted no competent, credible evidence to refute the Custodian's certification, the Custodian has borne his burden of proving that he did not unlawfully deny access to the requested surety bond pursuant to

N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. Because the Complainant's request for the records 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).
4. The Council does not have the authority under OPRA to develop and monitor a corrective action plan for the Township. N.J.S.A. 47:1A-7.b.
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 respond to the Complainant's OPRA request. However, the surety bond responsive to request Item No. 1 does not exist. Furthermore the Complainant's request Item No. 2 is invalid under OPRA because it fails to specifically identify a government record and would require the Custodian to conduct research. 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.

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

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012