



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2010-59

v.

City of Hoboken (Hudson)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian’s response denying the Complainant’s request for Library records and referring the Complainant to the attorney for the Library was done in conformity with his Counsel’s advice, and because the Custodian is entitled to rely on Counsel’s advice, the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant’s request for Library records and directed the Complainant to the City Library’s Attorney pursuant to In re Zisa, 385 N.J. Super. 188 (App. Div. 2006) and the Council’s decision in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008).
2. Because the Complainant’s request is overly broad and fails to specify identifiable government records, the request is invalid under OPRA. N.J.S.A. 47:1A-1.1. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has lawfully denied the Complainant’s request. N.J.S.A. 47:1A-6.
3. While the Council finds the Complainant’s request to be overly broad and therefore invalid under OPRA, the Custodian herein failed to immediately respond to the Complainant’s request for contracts. As in Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the Custodian had a duty to respond immediately because the Complainant’s request sought immediate access records,



i.e., contracts, pursuant to N.J.S.A. 47:1A-5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. See also Shanley v. City of Wildwood, GRC Complaint No. 2009-58 (June 2009).

4. Although the Custodian violated N.J.S.A. 47:1A-5.e., the Custodian responded to the Complainant's OPRA request on the third (3rd) business day following such request. Additionally, the Council finds that the Custodian has lawfully denied the Complainant's request, as the request constituted an overly broad and unclear request under OPRA. N.J.S.A. 47:1A-1.1. Also, the Council finds that the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant's request for Library records and directed the Complainant to the City Library's Attorney pursuant to the Appellate Division's decision in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006) and the Council's decision in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008). Consequently, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of January, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2010-59

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

Hoboken Public Library rules, procedures, regulations, policies, minutes of library board meetings, annual and quarterly reports, financial statements, contracts with Bergen County Cooperative Library System, and union contracts.

Request Made: February 3, 2010

Response Made: February 8, 2010

Custodian: Michael Mastropasqua

GRC Complaint Filed: March 16, 2010³

Background

February 3, 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.

February 4, 2010

E-mail from the Custodian's Counsel to the Custodian. The Custodian's Counsel apologizes for the delay in responding to a previous inquiry from the Custodian. Counsel states that she is checking with the Library Board and Library Attorney on the best way to deal with OPRA requests and will inform the Custodian when a decision is made.

February 8, 2010

E-mail from Custodian's Counsel to the Custodian. Counsel advises that all OPRA requests for library records should be denied and requestors should be directed to James Ryan, Esq., attorney for the Library.

¹ No legal representation listed on record.

² Represented by Alysia M. Smickley, Esq., of Kates, Nussman, Rapone, Eliss, & Farhi, LLP (Hoboken, NJ) (formerly represented by Steven W. Kleinman, Esq., Corporate Counsel).

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

February 8, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian asserts that the request for library records should be directed to James Ryan, Esq., attorney for the Hoboken Public Library ("Library"). The Custodian states that the City Clerk does not have access to library records because the Library is an independent agency.

February 12, 2010

Letter from the Complainant to the Custodian. The Complainant attaches an e-mail from Linda Podles, Library Director, to the Complainant dated January 19, 2010. The Complainant states that he is in receipt of the Complainant's February 8, 2010 letter regarding the Complainant's OPRA request. The Complainant asserts that the unresolved issue is whether the City Clerk is the custodian of the library records. The Complainant states that N.J.S.A. 47:1A-1.1 sets forth in pertinent part that the custodian of an agency is designated by that agency's director:

"Custodian of a government record" or "custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be." N.J.S.A. 47:1A-1.1.

The Complainant states that the attached e-mail dated January 19, 2010 from the Library Director, Ms. Podles, designates the City Clerk as Custodian of the Library records; the Clerk would then forward OPRA requests to the Library. The Complainant states that the Custodian has disagreed with the Library Director and instead directed the Complainant to contact the attorney for the Library, James Ryan, Esq.

The Complainant states that this confusion between local government officials is not a legal matter. The Complainant states that OPRA requests should not be referred to the attorney for the Library because the taxpayers should not have to pay the exorbitant fees for legal services of an outside law firm in order to resolve a simple administrative issue. The Complainant maintains that this issue should be resolved between the involved local government officials in the Custodian's Office and the Library and/or their superiors. The Complainant argues that even if legal advice were necessary, such advice should be provided by the Corporation Counsel, whose duties under Hoboken Ordinance § 54-33 apply to all proceedings involving the city or any of its officers, boards, bodies or commissions, including the City Clerk and the Library Director.

The Complainant states that the designation of Custodian of the Library records is a simple and basic governmental function that had already been performed by the Library Director, who has the powers and the duties to do so. The Complainant asserts that the Custodian cannot escape his duties as a custodian of Library records by directing requests to the attorney for the Library. The Complainant argues that spending taxpayer money for inflated attorney fees for completely unnecessary services of outside law firms to resolve administrative issues, which issues are clearly within the duties and the responsibilities of the local government officials, is an irresponsible and wasteful practice and should no longer be tolerated. The Complainant states that if there is a procedure or a policy to direct OPRA

requests for access to public records to outside law firms, it is time to review it and to reverse it.

March 16, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁴

- OPRA Request from Forde Prigot to the City of Hoboken dated December 11, 2009
- Acknowledgement of receipt of records from Forde Prigot, dated December 16, 2009
- Complainant’s OPRA request dated February 3, 2010
- Letter from the Custodian to the Complainant dated February 8, 2010

The Complainant asserts that on February 3, 2010 he filed an OPRA request with the Custodian for the records relevant to this complaint listed above. The Complainant further asserts that the Custodian denied access to the requested records on February 8, 2010 and directed the Complainant to James Ryan, Esq., attorney for the Library, and that the Custodian further stated that he does not have access to the requested records because the Library is an independent agency.

The Complainant disputes the Custodian's assertion that he does not have access to the requested records and states that the Custodian does have access to said records. The Complainant provides a copy of an OPRA request from Forde Prigot dated December 11, 2009 in support of this assertion. The Complainant states that on December 16, 2009, Forde Prigot was granted access to the requested records. The Complainant attaches a copy of the acknowledgement page in support of this statement.

The Complainant asserts that the Custodian has treated his OPRA request differently from Mr. Prigot's, which the Complainant asserts is a violation of his equal protection rights, as well as established procedure for access to the Library public records. The Complainant asserts that the denial of access slowed down, inhibited and ultimately prevented his access to the requested records.

The Complainant states that the Custodian has violated N.J.S.A. 47:1A-5.h., which requires a custodian to forward a request to the appropriate custodian or direct the requestor to the appropriate custodian. The Complainant states that OPRA does not support the Custodian's position and asserts that by denying access to the requested records and refusing to direct the complainant to the appropriate custodian, the Custodian herein has not acted in good faith.

May 3, 2010

Offer of Mediation sent to both parties.

May 4, 2010

The Custodian accepts the offer of mediation.

⁴ The Complainant submitted additional materials which are not relevant to these proceedings. Vesselin Dittrich v. City of Hoboken (Hudson), 2010-59 – Findings and Recommendations of the Executive Director

May 7, 2010

The Complainant agrees to mediation.

May 7, 2010

The Complaint is transmitted to mediation.

May 28, 2010

The complaint is referred back to the GRC for adjudication.

May 28, 2010

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

June 3, 2010

Custodian’s SOI with the following attachments:

- Letter from James Ryan, Esq., to Steven Kleinman, Corporation Counsel dated May 4, 2009
- Letter from Steven Kleinman, to James Ryan dated June 30, 2009
- Letter from Lina Podles, Library Director, to the Complainant dated December 24, 2009
- E-mail from Lina Podles to the Complainant dated January 19, 2010
- Complainant's OPRA request dated February 3, 2010
- E-mail from Custodian's Counsel to the Custodian dated February 4, 2010
- Memorandum from Michael Kates, Esq., Corporation Counsel to James J. Farina, City Clerk dated February 4, 2010
- E-mail from Custodian's Counsel to the Custodian dated February 8, 2010
- Custodian's response to the Complainant's OPRA request dated February 8, 2010
- Letter from the Complainant to the Custodian dated February 12, 2010

The Custodian certifies that no records were provided to the Complainant. The Custodian further certifies that the requested records are the property of the Library and are kept and maintained by the Library. The Custodian states that the Library is an independent corporate entity with power autonomous of the City of Hoboken. Board of Trustees of Free Public Library of Union City v. Union City, 112 N.J. Super. 484 (Ch. Div. 1970), *aff'd* 116 N.J. Super. 186 (App. Div. 1971) (holding that although free public libraries are adjunct of local government, the Library Board of Trustees constitutes a corporate entity with independent powers to operate and manage the library.) The Custodian asserts that all property of the Library is held in trust and managed by the Library Board of Trustees, not the political subdivision from which the Library was created, pursuant to N.J.S.A. 40:54-12. The Custodian asserts that the Complainant's request was inappropriately made to the City Clerk of the City of Hoboken when it should have been made to the Library Board of Trustees or its designated Custodian of Records.

The Custodian certifies that he attempted to assist the Complainant with finding the correct individual within the Library of whom to request the records by referring him to the Library’s attorney. The Custodian certifies that he did not attempt to search for records because the requested records are not within the control of the City.

The Custodian certifies that he is unaware whether the Library has taken any official action to designate a custodian of records. The Custodian asserts that OPRA makes it clear that a municipal clerk is not entrusted with the obligation of presiding as custodian of records for independent public agencies. N.J.S.A. 47:1A-1.1.

The Custodian asserts that the OPRA request was properly denied and that he directed the Complainant to a representative of the Library who could assist in determining the appropriate individual to whom the Complainant could submit his request.

The Custodian asserts that in the past, the GRC has ruled that OPRA requests should be directed to the designated custodian of records for the library involved in the request and not to the City Clerk. *See, e.g., Lamantia v. Jamesburg Public Library, GRC Complaint No. 2008-140 (February 2009).*

The Custodian acknowledges the Complainant's argument that a previous requestor who submitted a request for library records to the Custodian herein was granted access to said records. The Custodian states that he neither admits nor denies the truth of said assertion, but the Custodian asserts that the Library was established in its present form by ordinance dated 1959 to comply with N.J.S.A. 40:54-1 et seq. The Custodian further asserts that for many years, the City did not properly allow the Library to operate autonomously and manage itself independent of City politics. The Custodian states that during the City's recent state fiscal supervision, the Library and the City made arrangements to allow the Library to convert to an independent and autonomous agency as intended by state statute.

The Custodian states that the attached letter from General Counsel for the Library to Corporation Counsel for the City dated May 4, 2009 exemplifies the Library's aspirations to become independent in compliance with the state statute. The Custodian also asserts that the attached reply letter from Corporation Counsel to the Library's General Counsel dated June 30, 2009, shows the City's consent to have the Library transition to an autonomous and independent agency pursuant to law.

The Custodian states that the City has taken steps to change longstanding operations which interfered with the proper transition of the Library to an independent and autonomous agency. The Custodian states that in the event that the Custodian herein entertained previous OPRA requests for Library records, the current actions which have been taken to better comply with the state statutes for governance of Free Public Libraries should not be held against the City. The Custodian states that this is especially true when the clear language of OPRA and the Free Library laws demonstrate that the City was not the appropriate custodian of records. The Custodian asks the GRC to dismiss the present complaint because the denial of access was not unlawful.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5.h.

In the matter before the Council, the Complainant submitted an OPRA request to the Custodian on February 3, 2010. The Custodian responded to the request in writing on February 8, 2010, the third (3rd) business day following receipt thereof, denying access to the requested records and asserting that the request for Library records should be directed to James Ryan, Esq., attorney for the Library; the Custodian further stated that the Custodian does not have access to library records because the Library is an agency independent of the City of Hoboken.

OPRA provides that an officer or employee of a public agency who receives an OPRA request shall forward the request to the custodian of the record or direct the requestor to the custodian of the record. N.J.S.A. 47:1A-5.h.

The issue at hand is whether the Custodian’s response to the OPRA request directing the Complainant to the Library’s attorney violates N.J.S.A. 47:1A-5.h. The evidence is clear that the Library is an agency independent of the City of Hoboken and, moreover, that the Custodian did not have access to the records requested. The evidence is also clear that James Ryan, Esq., was Counsel for the Library at the time of the request.

However, the evidence of record also indicates that the Custodian’s response was based on the recommendation of his Counsel. The Superior Court of New Jersey’s Appellate Division has held that state officials are not liable for actions undertaken pursuant to advice from their legal counsel.

Reliance upon the advice of counsel as a defense to a charge that a municipal official acted in violation of his legal duty was considered in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006). In that case, the official relied upon the advice of the city attorney that he did not have a conflict of interest regarding award of a contract. The administrative law judge affirmed the decision of the Local Finance Board in concluding that the official violated the

Local Government Ethics Law; however, the Appellate Division reversed, holding that the official was entitled to rely upon the legal advice he had received and therefore did not violate the Ethics Law.

The Council observed the Zisa ruling in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008). In Elcavage, the custodian's counsel erroneously advised the custodian to release only a summarized version of requested e-mails. Pursuant to Zisa, the GRC observed that the custodian's actions were at the recommendation of their counsel, and accordingly found the custodian's actions were not an unlawful violation of OPRA.

In the instant case, as in Elcavage, the Custodian's response denying the Complainant's request for Library records and referring the Complainant to the attorney for the Library was done in conformity with his Counsel's advice. The Custodian is entitled to rely on Counsel's advice. Therefore, the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant's request for Library records and directed the Complainant to the City Library's Attorney pursuant to the Appellate Division's decision in Zisa and the Council's decision in Elcavage.

The Complainant has asserted that the Custodian treated the OPRA request of Forde Prigot differently from the Complainant's request for records, which the Complainant believes violates OPRA. However, a custodian's actions on other requests are not dispositive on the complaint now before the Council. See, Hardwick v. N.J. Dept. of Transportation, GRC Complaint No. 2007-164 (February 2008).

Moreover, the Complainant's request is invalid under OPRA because it is overly broad and fails to identify a specific government record sought.

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). As the court noted in invalidating MAG's request under OPRA:

"Most 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.* at 549.

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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ 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."⁶

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). *The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations.* N.J.S.A. 47:1A-5(f), (g), (i). Research is not among the custodian's responsibilities." (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, 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..."

This is further exemplified in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); where 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)."

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, *supra*.

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office. The GRC reasoned that while the Complainant's request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

"because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, *supra* and Bent, *supra* and the Council's decisions in Asarnow, *supra* and Morgano, *supra*. [citations omitted]."

In the instant complaint, the Complainant's request for a review of rules, procedures, regulations, policies, minutes of library meetings, annual, and quarterly reports, financial statements, contracts included with BCCLS and union contracts is an overly broad request that fails to specify any identifiable government records. As such, the Complainant's request is invalid under OPRA pursuant to MAG, Bent, Schuler, *supra* and Feiler-Jampel.

OPRA provides that:

"Immediate 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." [Emphasis added]. N.J.S.A. 47:1A-5.e.

Here, the Complainant requested "contracts with Bergen County Cooperative Library System and union contracts." The contracts requested by the Complainant are immediate access records pursuant to N.J.S.A. 47:1A-5.e. Moreover, in Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the "immediate access language of OPRA (N.J.S.A. 47:1A-5e) 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 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.

While the Council finds the Complainant's request to be overly broad and therefore invalid under OPRA, the Custodian herein failed to immediately respond to the Complainant's request for contracts. As in Herron, the Custodian had a duty to respond immediately because the Complainant's request sought immediate access records, *i.e.*, contracts, pursuant to N.J.S.A. 47:1A-5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. *See also* Shanley v. City of Wildwood, GRC Complaint No. 2009-58 (June 2009).

Whether the Custodian’s delay in responding to the OPRA request for an immediate access record rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.e. by not providing an immediate response to the request for contracts, the Custodian responded to the Complainant’s OPRA request on the third (3rd) business day following such request. Additionally, the Council finds that the Custodian has lawfully denied the Complainant’s request, as the request constituted an overly broad and unclear request under OPRA. N.J.S.A. 47:1A-1.1. Also, the Council finds that the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant’s request for Library records and directed the Complainant to the City Library’s Attorney pursuant to the Appellate Division’s decision in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006) and the Council’s decision in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008). Consequently, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were 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. Because the Custodian's response denying the Complainant's request for Library records and referring the Complainant to the attorney for the Library was done in conformity with his Counsel's advice, and because the Custodian is entitled to rely on Counsel's advice, the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant's request for Library records and directed the Complainant to the City Library's Attorney pursuant to In re Zisa, 385 N.J. Super. 188 (App. Div. 2006) and the Council's decision in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008).
2. Because the Complainant's request is overly broad and fails to specify identifiable government records, the request is invalid under OPRA. N.J.S.A. 47:1A-1.1. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has lawfully denied the Complainant's request. N.J.S.A. 47:1A-6.
3. While the Council finds the Complainant's request to be overly broad and therefore invalid under OPRA, the Custodian herein failed to immediately respond to the Complainant's request for contracts. As in Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the Custodian had a duty to respond immediately because the Complainant's request sought immediate access records, *i.e.*, contracts, pursuant to N.J.S.A. 47:1A-5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested contracts, the Custodian has violated N.J.S.A. 47:1A-5.e. *See also* Shanley v. City of Wildwood, GRC Complaint No. 2009-58 (June 2009).
4. Although the Custodian violated N.J.S.A. 47:1A-5.e., the Custodian responded to the Complainant's OPRA request on the third (3rd) business day following such request. Additionally, the Council finds that the Custodian has lawfully denied the Complainant's request, as the request constituted an overly broad and unclear request under OPRA. N.J.S.A. 47:1A-1.1. Also, the Council finds that the Custodian did not violate N.J.S.A. 47:1A-5.h. when he denied the Complainant's request for Library records and directed the Complainant to the City Library's Attorney pursuant to the Appellate Division's decision in In re Zisa, 385 N.J. Super. 188 (App. Div. 2006) and the Council's decision in Elcavage v. West Milford Township, GRC Complaint No. 2006-55 (July 2008). Consequently, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011