



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

August 28, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint Nos. 2011-128, 2011-129,
2011-130, 2011-131 & 2011-132

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s July 31, 2012 Interim Order by providing access to the requested records to the Complainant and Complainant’s Counsel via e-mail, certifying that no other responsive records existed and providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the GRC determined that the Complainant’s five (5) OPRA request were valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council’s July 31, 2012 Interim Order. 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 28th Day of August, 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: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2011-128, 2011-129,
2011-130, 2011-131
& 2011-132²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Borough of South Bound Brook (“Borough”).⁴
2. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Mr. William T. Cooper III, Esq.⁵ *See* footnote No. 3.
3. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. the Custodian.⁶
4. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Ms. JoAnne B. Schubert (“Ms. Schubert”).⁷
5. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Mr. Terry Warrelmann (“Mr. Warrelmann”).⁸

Requests Made: March 20, 2011

Responses Made: March 28, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: April 18, 2012⁹

¹ No representation list on record.

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

⁴ This request is the subject of GRC Complaint No. 2011-128.

⁵ This request is the subject of GRC Complaint No. 2011-129.

⁶ This request is the subject of GRC Complaint No. 2011-130.

⁷ This request is the subject of GRC Complaint No. 2011-131.

⁸ This request is the subject of GRC Complaint No. 2011-132.

⁹ The GRC received the Denial of Access Complaints on said date.

Background

July 31, 2012

Government Records Council's ("Council") Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted, by a majority vote, to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (2005 to 2001), pertaining to certain key words (criminal, civil and administrative investigations) and also identified the individuals named in the subpoena (the Borough, the Custodian, previous Counsel, Ms. Schubert and Mr. Warrelmann) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) do not apply to the OPRA requests relevant to these complaints. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in his files. Therefore, the Custodian must disclose the requested records to the Complainant. Moreover, if no records responsive to a particular OPRA request at issue herein exist, the Custodian must legally certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the Executive Director.¹¹**
3. 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.

August 3, 2012

Council's Interim Order distributed to the parties.

¹⁰ "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."

¹¹ 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.

August 10, 2012

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until August 17, 2012 to submit certified compliance of the Council's Interim Order to the Executive Director.

August 10, 2012

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until August 17, 2012 to submit certified compliance of the Council's Interim Order to the Executive Director.

August 17, 2012

Custodian's response to the Council's Order attaching responsive subpoenas. The Custodian certifies that the Council has ordered him to search for the subpoenas responsive to the Complainant's five (5) OPRA requests and provide same to the Complainant. The Custodian certifies that he conducted a search, located responsive records and e-mailed same to the Complainant on this date. The Custodian states that attached is the transmittal letter¹² and records. The Custodian certifies that he is in compliance with the Council's July 31, 2012 Order.¹³

August 17, 2012

E-mail from the GRC to the Custodian. The GRC states that, to memorialize a brief conversation via telephone, it is in receipt of the Custodian's certified confirmation of compliance. The GRC states that upon review of same, the GRC has determined that the Custodian's certification is deficient because it does not address whether "... records responsive to a particular OPRA request at issue herein exist ...". The GRC further notes that no transmittal letter was attached to the certification.

The GRC thus requests that the Custodian amend and resubmit his certification. The GRC notes that the Custodian's deadline to provide compliance to the GRC ends today and any submissions received after this date will be deemed to be tardy.

August 17, 2012

Custodian's amended response to the Council's Order attaching responsive subpoenas. The Custodian certifies that the Council has ordered him to search for the subpoenas responsive to the Complainant's five (5) OPRA requests and provide same to the Complainant. The Custodian certifies that he conducted a search, located responsive records and e-mailed same to the Complainant on this date. The Custodian certifies that attached are the all records responsive to the Complainant's OPRA requests and no other records responsive to same exist.

¹² The Custodian's legal certification did not include a letter to the Complainant.

¹³ The Complainant and Complainant's Counsel were copied on the e-mail attaching the Custodian's certification and copy of the scheduling notice.

Analysis

Whether the Custodian complied with the Council's July 31, 2012 Interim Order?

At its July 31, 2012 meeting, the Council ordered the Custodian to:

“...disclose the requested records to the Complainant. Moreover, if no records responsive to a particular OPRA request at issue herein exist, the Custodian must legally certify to this fact. **The Custodian shall comply with Item No. 1 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**” (Footnotes omitted.)

The Council disseminated its Interim Order to the parties on August 3, 2012. Thus, the Custodian's response was due by close of business on August 10, 2012.

On August 10, 2012, the Custodian requested an extension of time until August 17, 2012 to comply with the Council's Order: the GRC granted said extension. Thereafter on August 17, 2012, the Custodian provided certified confirmation of compliance to the Executive Director that he forwarded subpoenas to the Complainant and Complainant's Counsel via e-mail on August 17, 2012. However, the Custodian did not certify to whether records for a particular request exist nor did the Custodian certify whether the records provided represented all records responsive to the Complainant's five (5) OPRA requests.

Thus, the GRC e-mailed the Custodian on August 17, 2012 requesting that he submit an amended certification. The Custodian subsequently submitted an amended certification on the same day in which he certified that no other responsive records existed.

Therefore, the Custodian timely complied with the Council's July 31, 2012 Interim Order by providing access to the requested records to the Complainant and Complainant's Counsel via e-mail, certifying that no other responsive records existed and providing certified confirmation to the GRC within the extended time frame to comply.

Whether the Custodian's denial of access 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 (Felder 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 GRC determined that the Complainant’s five (5) OPRA request were valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council’s July 31, 2012 Interim Order. 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 timely complied with the Council’s July 31, 2012 Interim Order by providing access to the requested records to the Complainant and Complainant’s Counsel via e-mail, certifying that no other responsive records existed and providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the GRC determined that the Complainant’s five (5) OPRA request were valid under OPRA and thus the Custodian failed to bear his burden of a lawful denial of access pursuant to N.J.S.A. 47:1A-6, the Custodian timely complied with the Council’s July 31, 2012 Interim Order. 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

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INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

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2011-130, 2011-131 & 2011-132

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council ("Council") considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (2005 to 2001), pertaining to certain key words (criminal, civil and administrative investigations) and also identified the individuals named in the subpoena (the Borough, the Custodian, previous Counsel, Ms. Schubert and Mr. Warrelmann) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) do not apply to the OPRA requests relevant to these complaints. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in his files. Therefore, the Custodian must disclose the requested records to the Complainant. Moreover, if no records responsive to a particular OPRA request at issue herein exist, the Custodian must legally certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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 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.

3. 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.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 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: August 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

**GRC Complaint No. 2011-128, 2011-129,
2011-130, 2011-131
& 2011-132²**

v.

**Borough of South Bound Brook (Somerset)³
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Borough of South Bound Brook (“Borough”).⁴
2. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Mr. William T. Cooper III, Esq.⁵ *See* footnote No. 3.
3. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. the Custodian.⁶
4. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Ms. JoAnne B. Schubert (“Ms. Schubert”).⁷
5. Subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 re: State of New Jersey v. Mr. Terry Warrelmann (“Mr. Warrelmann”).⁸

Requests Made: March 20, 2011

Responses Made: March 28, 2011

Custodian: Donald E. Kazar

GRC Complaint Filed: April 18, 2012⁹

¹ No representation list on record.

² Due to the commonality of the parties and the issues herein, the GRC has consolidated these complaints for adjudication.

³ Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper III, Esq. (Somerville, NJ), who advised the GRC on May 6, 2011 that he no longer represents the Borough.

⁴ This request is the subject of GRC Complaint No. 2011-128.

⁵ This request is the subject of GRC Complaint No. 2011-129.

⁶ This request is the subject of GRC Complaint No. 2011-130.

⁷ This request is the subject of GRC Complaint No. 2011-131.

⁸ This request is the subject of GRC Complaint No. 2011-132.

⁹ The GRC received the Denial of Access Complaints on said date.

Background

March 20, 2011¹⁰

Complainant's five (5) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to these complaints listed above on five (5) official OPRA request forms. The Complainant indicates that the preferred method of delivery is either facsimile or electronic.

March 28, 2011

Custodian's response to the OPRA requests. On behalf of the Custodian, previous Counsel responds in writing via e-mail to the Complainant's OPRA requests on the fifth (5th) business day following receipt of such requests.¹¹ Counsel states that the Complainant's five (5) OPRA requests sought subpoenas from 2005 through 2011 covering criminal, civil and administrative investigations. Counsel states that the Complainant's OPRA requests further noted five (5) individuals: previous Counsel, the Custodian, the Borough, Ms. Schubert and Mr. Warrelmann.

Counsel states that 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-1.1." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Counsel states that 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." *Id.* at 549.

Counsel states that in determining that MAG'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.*

¹⁰ March 20, 2011 was a Sunday.

¹¹ The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on March 21, 2011.

Counsel further states that in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), the Superior Court references MAG in holding that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” Counsel states that the Court further held that “[a]s 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.”

Counsel states that 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...” Counsel states that the Court also quoted N.J.S.A. 47:1A-5.g: “[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.” Counsel states that 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...”

Counsel states that in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests [Items No.] 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] and [Bent].”

Counsel states that the Complainant’s OPRA requests do not identify a specific government record and thus the Borough cannot comply with same.

April 18, 2011

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

- Complainant’s five (5) OPRA requests dated March 20, 2011.
- E-mail from previous Counsel to the Complainant dated March 28, 2011.

The Complainant states that he submitted five (5) OPRA requests to the Borough on March 20, 2011. The Complainant states that previous Counsel responded in writing on March 28, 2011 denying access to the Complainant’s OPRA requests and stating that said requests were invalid.

The Complainant disputes the Borough’s denial of access. The Complainant states that in Byrnes v. Morris County Prosecutor’s Office, GRC Complaint No. 2009-323 (Interim Order dated December 21, 2010), the Council held that:

“[b]ecause the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena

and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG and Bent *do not apply to the request relevant to this complaint*. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in her files." (Emphasis added.) *Id.* at pg. 6.

The Complainant contends that he believes the GRC's holding contradicts the Borough's denial of access. The Complainant further asserts that previous Counsel and the Custodian must know that responsive records exist because they have not stated otherwise.

The Complainant argues that regarding OPRA request items No. 2 and No. 5, the subpoenas sought are for previous Counsel and Mr. Warrelmann, whom previous Counsel privately represented. The Complainant thus questions whether previous Counsel denied access based on the Borough's interests or his own.

The Complainant requests that the GRC determine that the Custodian and previous Counsel knowingly and willfully violated OPRA. The Complainant contends that if he was able to locate Byrnes, which contradicts previous Counsel's denial of access, then previous Counsel certainly should have been able to locate same and disclose the responsive records accordingly. The Complainant contends that this alone confirms that the Custodian's and previous Counsel's actions are knowing and willful.

The Complainant does not agree to mediate this complaint.

June 28, 2011

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

June 29, 2011

E-mail from the Custodian to the GRC. The Custodian states that he is in receipt of multiple requests for SOIs from the GRC. The Custodian requests an extension of time until July 15, 2011 to submit the SOIs because of the number of complaints in addition to the upcoming holiday.

June 29, 2011

E-mail from the GRC to the Custodian. The GRC states that it will routinely grant one (1) extension of five (5) business days to submit an SOI; however, based on the circumstances provided, the GRC grants the Custodian an extension of time until July 15, 2011, or seven (7) business days, to submit the SOIs.

July 18, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until July 20, 2011 to submit the SOIs due to administrative error.

July 18, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until July 20, 2011 to submit the SOIs.

July 19, 2011

Custodian's SOIs with no attachments.

The Custodian certifies that the last date upon which records that may have been responsive to the 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 is not applicable.¹²

The Custodian certifies that he received the Complainant's five (5) OPRA requests on March 21, 2011. The Custodian certifies that previous Counsel responded in writing on March 28, 2011 denying access to the OPRA requests stating that same were invalid.

The Custodian argues that these complaints should be dismissed because the Complainant's OPRA requests are invalid. The Custodian contends that the Complainant's OPRA requests seek seven (7) years of subpoenas for three (3) specific key words but lack specific data required to locate responsive records; thus, the Custodian would have to perform an open-ended search of his files to locate the responsive records. The Custodian asserts that the Courts have consistently upheld such a denial. MAG, *supra*.

The Custodian asserts that the Complainant's actions prove that he knew his requests were invalid. The Custodian asserts that the Complainant, on his own accord, revised and resubmitted new OPRA requests for the same records by year instead of by person.¹³

The Custodian finally requests that the GRC review whether the Borough is capable of seeking fees from the Complainant for misleading or omitting information and submitting frivolous complaints.

July 20, 2011

Letter from the Complainant to the GRC. The Complainant reiterates that because neither the Custodian nor previous Counsel stated that no responsive records exist, responsive records do exist. The Complainant further asserts that the Custodian also did not certify in the SOI that no records existed; thus, it is undisputed that records responsive exist.

The Complainant asserts that these complaints are comparable to Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2010-105 & 2010-106 (January 2012), where the Custodian and Borough attorney are directly connected or intimately related to the parties associated with the records at issue. The Complainant contends that the Custodian's actions in Verry and now here indicate that the Custodian would knowingly and willfully deny access to records in order to keep them hidden from

¹² The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

¹³ These requests are the subject of GRC Complaint Nos. 2011-161, 2011-162, 2011-163, 2011-164, 2011-165, 2011-166 and 2011-167.

the public. The Complainant states that as an example, the Borough aggressively defended its denial of access to the investigation report regarding Mr. Warrelmann's family in Verry; however, the Borough quickly disclosed an operations report because the individuals involved were not intimately connected to the Borough. The Complainant contends that this example shows why public officials directly or indirectly involved with the records at issue in a request should recuse themselves from such request. The Complainant contends that he believes that the Borough would have disclosed the responsive records if not for the individuals and subjects named in each OPRA request.

The Complainant further contends that previous Counsel knowingly and willful violated OPRA by erroneously basing his denial of access on MAG and Bent when the GRC has already determined that these cases do not apply to requests for subpoenas. The Complainant states that previous Counsel stated at the end of his response that the requests failed to identify a government record. The Complainant states that in Byrnes, the phrase "a subpoena or subpoenas" is literally incorporated into the GRC's decision which is used to strengthen the GRC's confirmation that "subpoena or subpoenas" are in fact identifiable government records.

The Complainant states that according to Byrnes, if a requestor identifies the topic of the record within a specific date range and identifies the individual named in the subpoena and his/her employer, the custodian is expected to locate the responsive records and disclose same. The Complainant contends that it is undisputed that his OPRA requests were valid under Byrnes; thus, the Custodian should have provided to him the responsive subpoenas. The Complainant further contends that similar to Byrnes, the Custodian here was only required to search for and locate the responsive subpoenas.

The Complainant further argues that the Custodian attempted to mislead the GRC by pointing out that the Complainant resubmitted new OPRA requests for the same records by year instead of by person. The Complainant argues that he resubmitted such requests in accordance with previous Counsel's suggestion to review Byrnes. The Complainant asserts that he submitted these new OPRA requests in order to show that the Borough was unlawfully denying access to said records and to eliminate any defense in any subsequent denial of access complaints involving the same records.

Finally, the Complainant contends that when these complaints are viewed in conjunction with other complaints filed against the Custodian (*e.g.*, Perilli v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2006-180 (September 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-49 (June 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (January 2012); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-335 (January 2011)(voluntary withdrawal); LaGrua v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-336 (January 2011)(voluntary withdrawal)), it is clear that the Custodian's track record of egregious conduct warrants appropriate sanctions by the GRC.

Analysis

Whether the Complainant's five (5) requests are invalid under OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

The Complainant's five (5) requests herein sought "subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011 ..." filed by the State against the Borough, previous Counsel, Custodian, Ms. Schubert and Mr. Warrelmann. Previous Counsel responded in writing on behalf of the Custodian in a timely manner stating that the Complainant's requests were invalid. The Complainant subsequently filed this complaint arguing that his requests were not invalid pursuant to Byrnes, supra.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹⁴ 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.”¹⁵

Moreover, 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

¹⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁵ As stated in Bent, *supra*.

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...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found that “[b]ecause the Complainant’s OPRA requests [Items No.] 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).”

Here, the Complainant’s five (5) requests sought “subpoena or subpoenas regarding criminal, civil and administrative investigations from 2005 to 2011” and identified five (5) individuals by name. In the Denial of Access Complaint, the Complainant disputed previous Counsel’s denial of access that the requests were overly broad by citing to Byrnes. In Byrnes, the complainant sought “any subpoena served on Michael Gosden ... to appear from May 21, 2007 to June 17, 2007;” the custodian responded in a timely manner stating that the request was too vague and lacked specific information such as the case name or case number. The complainant filed a Denial of Access Complaint disputing the custodian’s denial of access and arguing that his request sought a specific record and provided additional specific information that further narrowed the request. The Council, tasked with determining whether the request was valid, held that:

“[b]ecause the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG and Bent do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in her files. Therefore, the Custodian must disclose the requested record to the Complainant.” *Id.* at pg. 6.

The Council reasoned that:

“... the Complainant framed his request such that the records sought were specifically identifiable pursuant to Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of ‘[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.’ *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.” *Id.*

In the matter before the Council, the OPRA requests at issue are similar to, if not more specific than, the requests in Byrnes and are valid under OPRA. Specifically, the Complainant included the specific type of record, a time period, (3) key words and five (5) individuals who were named in the subpoenas sought. Thus, said requests contain enough information for the Custodian simply to search his files to find the responsive subpoenas.

Therefore, because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (2005 to 2001), pertaining to certain key words (criminal, civil and administrative investigations) and also identified the individuals named in the subpoena (the Borough, the Custodian, previous Counsel, Ms. Schubert and Mr. Warrelmann) MAG, Bent, NJ Builders and Schuler do not apply to the OPRA requests relevant to these complaints. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in his files. Therefore, the Custodian must disclose the requested records to the Complainant. Moreover, if no records responsive to a particular OPRA request at issue herein exist, the Custodian must legally certify to this fact.

Whether the Custodian's denial of access rises 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. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (2005 to 2001), pertaining to certain key words (criminal, civil and administrative investigations) and also identified the individuals named in the subpoena (the Borough, the Custodian, previous Counsel, Ms. Schubert and Mr. Warrelmann) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) do not apply to the OPRA requests relevant to these complaints. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in his files. Therefore, the Custodian must disclose the requested records to the Complainant. Moreover, if no records responsive to a particular OPRA request at issue herein exist, the Custodian must legally certify to this fact.
2. **The Custodian shall comply with Item No. 1 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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁶ to the Executive Director.¹⁷**
3. 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.

¹⁶ "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."

¹⁷ 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.

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