



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

February 26, 2013 Government Records Council Meeting

Chris Hayes
Complainant

Complaint No. 2011-368

v.

City of Passaic (Passaic)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s January 29, 2013 Order because on February 5, 2013, the fourth (4th) business day after receipt of the Council’s Order, the Custodian provided certified confirmation of compliance to the Executive Director that the records responsive to the Complainant’s May 17, 2011 OPRA request do not exist.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant’s first (1st) and second (2nd) OPRA requests within seven (7) business days. The Custodian also violated N.J.S.A. 47:1A-6 her burden that the records responsive to the second (2nd) request are exempt from disclosure. However, the Custodian timely complied with the Council’s January 29, 2013 Interim Order and certified that no records responsive to the Complainant’s May 17, 2011 OPRA request exist. 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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Chris Hayes¹
Complainant**

GRC Complaint No. 2011-368

v.

**City of Passaic (Passaic)²
Custodian of Records**

Records Relevant to Complaint:³

April 20, 2011: Information on active cash bonds, deposits and escrows that are collected and maintained for construction assurance purposes for residential and commercial projects that would be refunded upon project completion and the passing of all required inspections.

May 17, 2011: Most recently received bank statement of active escrow accounts for construction, review performance, maintenance and/or inspections.⁴

Request Made: April 20, 2011 and May 17, 2011

Response Made: May 17, 2011

Custodian: Amada Curling

GRC Complaint Filed: December 5, 2011⁵

Background

At its January 29, 2013 public meeting, the Council considered the January 22, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests either granting access, denying access, seeking clarification or requesting an

¹ The Complainant is employed with Asset Management Consultants.

² Represented by Christopher K. Harriott, Esq., of Florio & Kenny, LLP (Hoboken, NJ).

³ The Complainant attached to her Denial of Access Complaint an OPRA request dated June 6, 2011 from Ms. Jessica Kearns, also an employee with Asset Management Consultants. However, the Council will not consider this OPRA request in its Findings and Recommendations because in order for Ms. Kearns to challenge this denial, she must file a separate Denial of Access Complaint pursuant to N.J.S.A. 47:1A-6.

⁴ The Custodian failed to respond to the Complainant's OPRA request dated May 17, 2011.

⁵ The GRC received the Denial of Access Complaint on said date.

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 Complainant’s first (1st) OPRA request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005) and 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 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian has not borne her burden that the records responsive to the second (2nd) request are exempt from disclosure pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of the records responsive to the second (2nd) OPRA request or certify that no records responsive exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, or certify that the records responsive do not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.**
5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant’s first (1st) OPRA request exist, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. 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.

The Council distributed its Interim Order to all parties on January 30, 2013. On February 5, 2013, the fourth (4th) business day after receipt thereof, the Custodian responded to the Council’s Interim Order. The Custodian certifies that she reviewed the Complainant’s OPRA request dated May 17, 2011. The Custodian also certifies that after inquiring with the Finance Department, she was advised that there are no records responsive to the request because the City of Passaic does not maintain such escrow accounts.

⁶ "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."

Analysis

Compliance

At its January 29, 2013 the Council ordered the Custodian to provide copies of the records responsive to the Complainant's May 17, 2011 OPRA request or certify that the records responsive do not exist within five (5) business days of receipt of said Order. The Council disseminated its Order on January 30, 2013. Thus, the Custodian's response was due by close of business on February 6, 2013.

The Custodian timely complied with the Council's January 29, 2013 Order because on February 5, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director that the records responsive to the Complainant's May 17, 2011 OPRA request do not exist.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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) by failing to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests within seven (7) business days. The Custodian also violated N.J.S.A. 47:1A-6 her burden that the records responsive to the second (2nd) request are exempt from disclosure. However, the Custodian timely complied with the Council's January 29, 2013 Interim Order and certified that no records responsive to the Complainant's May 17, 2011 OPRA request exist. 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 January 29, 2013 Order because on February 5, 2013, the fourth (4th) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the Executive Director that the records responsive to the Complainant's May 17, 2011 OPRA request do not exist.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests within seven (7) business days. The Custodian also violated N.J.S.A. 47:1A-6 her burden that the records responsive to the second (2nd) request are exempt from disclosure. However, the Custodian timely complied with the Council's January 29, 2013 Interim Order and certified that no records responsive to the Complainant's May 17, 2011 OPRA request exist. 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: Karyn Gordon, Esq.
Acting Executive Director

February 19, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Chris Hayes
Complainant

Complaint No. 2011-368

v.

City of Passaic (Passaic)
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 did not bear her burden of proof that she timely responded to either of the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s first (1st) and second (2nd) OPRA requests 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 Complainant’s first (1st) OPRA request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005) and 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 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian has not borne her burden that the records responsive to the second (2nd) request are exempt from disclosure pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of the records responsive to the second (2nd) OPRA request or certify that no records responsive exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for**



each redaction, or certify that the records responsive do not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.

5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's first (1st) OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. 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 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 30, 2013

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Chris Hayes¹
Complainant**

GRC Complaint No. 2011-368

v.

**City of Passaic (Passaic)²
Custodian of Records**

Records Relevant to Complaint:³

April 20, 2011: Information on active cash bonds, deposits and escrows that are collected and maintained for construction assurance purposes for residential and commercial projects that would be refunded upon project completion and the passing of all required inspections.

May 17, 2011: Most recently received bank statement of active escrow accounts for construction, review performance, maintenance and/or inspections.⁴

Request Made: April 20, 2011 and May 17, 2011

Response Made: May 17, 2011

Custodian: Amada Curling

GRC Complaint Filed: December 5, 2011⁵

Background

December 5, 2011

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

- Complainant’s first (1st) OPRA request dated April 20, 2011
- Facsimile from the Custodian to the Complainant dated May 17, 2011
- Complainant’s second (2nd) OPRA request dated May 17, 2011

¹ The Complainant is employed with Asset Management Consultants.

² Represented by Christopher K. Harriott, Esq., of Florio & Kenny, LLP (Hoboken, NJ).

³ The Complainant attached to her Denial of Access Complaint an OPRA request dated June 6, 2011 from Ms. Jessica Kearns, also an employee with Asset Management Consultants . However, the Council will not consider this OPRA request in its Findings and Recommendations because in order for Ms. Kearns to challenge this denial, she must file a separate Denial of Access Complaint pursuant to N.J.S.A. 47:1A-6.

⁴ The Custodian failed to respond to the Complainant’s OPRA request dated May 17, 2011.

⁵ The GRC received the Denial of Access Complaint on said date.

Complainant's OPRA request dated April 20, 2011:

The Complainant states she filed her first (1st) OPRA request on April 20, 2011. The Complainant also states that she received a facsimile from the Custodian on May 17, 2011 stating that no records responsive to the request exist.

Complainant's OPRA request dated May 17, 2011:

The Complainant further states that she submitted a second (2nd) OPRA request on May 17, 2011 which clarified her first (1st) OPRA request. The Complainant states that she telephoned the Clerk's office and spoke with Ms. Madeline Rios on May 23, 2011 and requested a status for her request. The Complainant also states that Ms. Rios told her to resend a copy of the request and that Ms. Rios would double check its status. The Complainant further states that she later telephoned the Custodian's office and again requested another status update. The Complainant additionally states that the Custodian telephoned her on June 6, 2011 stating that the Custodian already responded to the OPRA request on May 17, 2011. The Complainant states that she informed the Custodian that her May 17, 2011 response was for the first (1st) OPRA request.

The Complainant agrees to mediate this complaint.⁶

January 5, 2012

Custodian's Statement of Information ("SOI") with no attachments.

The Custodian certifies that her search for the requested records included consulting with the Finance Department and Legal Counsel. The Custodian also 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 Records Management Services is not applicable in the instant complaint.

The Custodian certifies that she received the Complainant's OPRA request on April 20, 2011. The Custodian also certifies that she responded to the Complainant's request on May 17, 2011, stating that no records responsive to request exist. The Custodian further certifies that there are no records responsive to the Complainant's April 20, 2011 OPRA request.⁷

January 30, 2012

Letter from the Complainant to the Custodian. The Complainant states that she is trying to clarify what records she is seeking in her first (1st) OPRA request dated April 20, 2011. The Complainant also states that she is attaching a copy of a ledger book that the former City Clerk provided to her pursuant to a separate OPRA request in 2002. The Complainant further states that she is aware that the ledger book format is probably no longer in use by the City of Passaic. The Complainant additionally states that she is seeking a copy of the record that the City uses to track active construction related escrow accounts.

⁶ The Custodian failed to respond to the GRC's request for mediation.

⁷ The Custodian fails to address the Complainant's second (2nd) OPRA request dated May 17, 2011.

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).⁸ 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).

The Complainant filed her first (1st) OPRA request on April 20, 2011. The Custodian certified in the SOI that she responded to the request on May 17, 2011, the eighteenth (18th) business day following receipt of said request. The Complainant also filed her second (2nd) OPRA request on May 17, 2011. However, there is no evidence in the instant complaint that the Custodian responded to the Complainant's second (2nd) OPRA request. Therefore the Custodian failed to timely respond to both of the Complainant's OPRA requests.

Therefore, the Custodian did not bear her burden of proof that she timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such,

⁸ 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.

the Custodian's failure to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests 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 Custodian unlawfully denied the Complainant access to the records responsive to the first (1st) and second (2nd) OPRA requests?

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 first (1st) request sought in part "[i]nformation on active cash bonds, deposits and escrows that are collected and maintained for construction assurance purposes for residential and commercial projects..." The Complainant's second (2nd) request sought "most recently received bank statement of active escrow accounts for construction, review performance, maintenance or inspections." The Complainant's first request is invalid under OPRA.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make*

identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). 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),⁹ 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."¹⁰

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.

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

Further, 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...” 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 # 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, *supra* and Bent, *supra*.

In the instant complaint, the Complainant’s first (1st) request seeks information. The Complainant fails to specifically identify a government record, *i.e.* bank statements or escrow account statements. The Complainant also fails to identify a specific commercial project or commercial projects within a specified date range. Thus, the Complainant’s first (1st) request is invalid under OPRA.

Therefore, because the Complainant’s first (1st) OPRA request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA pursuant to MAG, *supra* and Bent, *supra*, New Jersey Builders Association, *supra* and Schuler, *supra*.

Further, the Custodian responded to the Complainant's first (1st) OPRA request stating that no records responsive exist. In addition, the Custodian certified in the SOI that no records exist which are responsive to the Complainant's first (1st) OPRA request. Although the Complainant attempted to clarify her first (1st) OPRA request on January 30, 2012 via letter to the Custodian by attaching a copy of a ledger book that the former City Clerk provided to her pursuant to a separate OPRA request in 2002, this submission does not refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to these records, because no records responsive exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

However, the Complainant's second (2nd) OPRA request is valid because it specifies an identifiable government record, *i.e.*, bank statements; time period, *i.e.*, most recent, and type of bank statements, *i.e.*, escrow accounts, for construction, review performance, maintenance and/or inspections. Therefore, the Custodian has not borne her burden that the records responsive to the second (2nd) request are exempt from disclosure pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of the records responsive to the second (2nd) OPRA request or certify that no records responsive exist.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to either of the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's first (1st) and second (2nd) OPRA requests 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 Complainant's first (1st) OPRA request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005) and 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 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. The Custodian has not borne her burden that the records responsive to the second (2nd) request are exempt from disclosure pursuant to N.J.S.A. 47:1A-6. The Custodian must disclose a copy of the records responsive to the second (2nd) OPRA request or certify that no records responsive exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions as necessary, including a detailed document index explaining the lawful basis for each redaction, or certify that the records responsive do not exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹¹ to the Executive Director.**
5. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's first (1st) OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to these records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013

¹¹ "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."