



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

April 29, 2014 Government Records Council Meeting

Richard P. Cushing, Esq.  
Complainant

Complaint No.: 2013-229

v.

Washington Township Fire District No. 1  
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 his burden of proof that he provided a timely or sufficient response to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to provide a specific, written response to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272.
2. The Custodian lawfully denied access to portions of the Complainant’s request because it is impermissibly broad and open-ended. *See* N.J.S.A. 47:1A-6; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), he did respond verbally to the Complainant on June 3, 2013, five (5) business days after the request. While this was an invalid unwritten response under OPRA, and the Custodian did not reply to the Complainant’s June 26, 2013 inquiry or the GRC’s request for an SOI, 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, 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 29<sup>th</sup> Day of April, 2014

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: May 2, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 29, 2014 Council Meeting**

**Richard P. Cushing, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-229**

**v.**

**Washington Township Fire District No. 1<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “All documents in possession of Washington Township Fire District (WTFD), or its commissioners, officers, directors, agents, employees or governing body relating to the authorization and payment of stipends, compensation or salaries to fire commissioners from the time the WTFD was created to date. [Specifically], and without limitation, this would include public notices of the intent to award stipends, resolutions authorizing stipends, minutes of any and all meetings at which the stipends were discussed, and any other documents related to that authorization or the continuing authorization or decision to continue to pay the stipends.”

**Custodian of Record:** Ralph Dorio  
**Request Received by Custodian:** May 24, 2013  
**Response Made by Custodian:** None  
**GRC Complaint Received:** August 7, 2013

**Background<sup>3</sup>**

**Request and Response:**

On May 24, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 3, 2013, five (5) business days later, the Complainant’s assistant (“Ms. Hammer”) contacted the Custodian. The Custodian told Ms. Hammer that he had been out of town and that he would reply by the end of the week. On June 26, 2013, Ms. Hammer emailed the Custodian requesting a reply to the above OPRA request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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### Denial of Access Complaint:

On August 7, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he has not received a valid response to his May 24, 2013 OPRA request. The Complainant states that he submitted an OPRA request to the Custodian in February, 2013, but received documents that were not fully responsive to his request. The Complainant further states that the request at issue here is more specific than the one he made previously. The Complainant notes that on June 3, 2013, the Custodian verbally informed Ms. Hammer that the responsive documents had been disclosed, in response to a previous request, and that a reply would be provided by the end of the week. The Complainant additionally notes that Ms. Hammer contacted the Custodian via email on June 26, 2013, but that there has been no reply.

### Statement of Information:

On September 18, 2013, the GRC requested that the Custodian submit a Statement of Information (“SOI”). The GRC did not receive a completed SOI from the Custodian.

## Analysis

### Timeliness and Sufficiency of Response

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> 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).

Further, in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), a custodian did not respond to a complainant’s January 29, 2004 request because he considered the complainant’s January 26, 2004 request, and his response, to be sufficiently similar to satisfy the requirements of OPRA. The Council found that the custodian unlawfully denied access because he failed to provide a specific response to the January 29, 2004 request as required by N.J.S.A. 47:1A-5(i). Id. See also Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) (finding custodian’s response legally insufficient pursuant to N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-5(g) for failing to respond to each request item individually).

Here, the record indicates that the Custodian provided a verbal response to Ms. Hammer when she reached out to him five (5) business days after the Complainant’s request. The

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<sup>4</sup> 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.  
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Complainant, however, did not receive a subsequent response from the Custodian, either verbal or written. As in O'Shea, the Custodian appears to have believed that his response to the Complainant's February, 2013 OPRA request was sufficient to satisfy the May 24, 2013 request.

Therefore, the Custodian did not bear his burden of proof that he provided a timely or sufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to provide a specific, written response to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11; O'Shea, GRC 2004-17; Paff, GRC 2007-272.

### **Unlawful Denial of Access**

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 New Jersey Appellate Division has held that:

While 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.

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Court reasoned that:

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.” *Id.* at 549. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant requested “[a]ll documents in possession of [WTFD] . . . relating to the authorization and payment of stipends, compensation or salaries to fire commissioners from the time WTFD was created to date.” The Complainant stated that this includes, without limitation, “public notices of the intent to award stipends, resolutions authorizing stipends, minutes of any and all meetings at which the stipends were discussed and any other documents related to that authorization . . . .”

The Complainant’s request for “all documents” relating to the “authorization and payment” of various forms of compensation to fire commissioners since the creation of WTFD does not identify with the requisite specificity the government records sought. MAG, 375 N.J. Super. at 549. Likewise, the Complainant’s request “without limitation” for public notices, resolutions, minutes from “any and all meetings,” and “any other documents” related to such authorization is overly broad. *Id.* These portions of the request do not seek identifiable government records and, instead, are analogous to the open-ended demands requiring a custodian perform research, rather than merely a search, rejected by the court in MAG. *Id.* at 546, 549.

Therefore, the Custodian lawfully denied access to the Complainant’s request because it is impermissibly broad and open-ended. *See* N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 546, 549; Bent, 381 N.J. Super. at 37; N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler, GRC 2007-151.

### **Knowing & Willful**

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 that “[i]f 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

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<sup>5</sup> Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

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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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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(g) and N.J.S.A. 47:1A-5(i), he did respond verbally to the Complainant on June 3, 2013, five (5) business days after the request. While this was an invalid unwritten response under OPRA, and the Custodian did not reply to the Complainant's June 26, 2013 inquiry or the GRC's request for an SOI, 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, 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 did not bear his burden of proof that he provided a timely or sufficient response to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to provide a specific, written response to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007); O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272.
2. The Custodian lawfully denied access to portions of the Complainant's request because it is impermissibly broad and open-ended. See N.J.S.A. 47:1A-6; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546, 549 (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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
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request for an SOI, 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, 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

April 22, 2014