



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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COMMISSIONER SUSAN BASS LEVIN  
COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**February 28, 2007 Government Records Council Meeting**

James Donato  
Complainant

Complaint No. 2005-182

v.

Township of Union  
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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 pursuant to the Custodian’s February 20, 2007 certification, the Custodian has complied with the Council’s January 31, 2007 Interim Order within the required time frame.

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 28<sup>th</sup> Day of February, 2007

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council



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

Kathryn Forsyth  
Government Records Council

**Decision Distribution Date: March 7, 2007**

STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director  
February 28, 2007 Council Meeting

James Donato<sup>1</sup> (on behalf of Capitol Publishing)<sup>2</sup>  
Complainant

GRC Complaint No. 2005-182

v.

Township of Union<sup>3</sup>  
Custodian of Records

**Records Relevant to Complaint:**

All motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005.

*Request Made: September 15, 2005*

*Response Made: September 23, 2005*

*Custodian: Eileen Birch*

**GRC Complaint Filed:** September 28, 2005

**Background**

January 31, 2007

Government Records Council's ("Council") Interim Order. At its January 31, 2007 public meeting, the Council considered the January 24, 2007 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) Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records. Therefore, the Custodian unlawfully denied access to the requested records.
- 2) **The Custodian shall provide the requested records to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction within five (5) business**

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<sup>1</sup> Request filed by Alberto Fusco of Capitol, Inc. However, he is no longer employed by that company.

<sup>2</sup> No attorney listed.

<sup>3</sup> Custodian represented by Francis D. McIntyre, Esq. of McIntyre and Kirshenbaum, LLC (Springfield, N.J.).

**days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director.**

- 3) The Custodian erroneously believed that the Complainant's request was not specific enough. Though this belief may be classified as negligent or heedless, it does not contain the element of conscious wrongdoing needed in order to find a knowing and willful violation of OPRA. Therefore, the Custodian's actions do not constitute a knowing and willful violation of OPRA.

**February 2, 2007**

Council's Interim Order distributed to the parties.

February 20, 2007

Custodian's response to the Council's Interim Order. The Custodian certifies that he mailed the requested records to the Complainant on February 6, 2007 in accordance with the Council's Interim Order.

**Analysis**

**Whether the Custodian complied with the Council's (date) Interim Order?**

The Custodian provided a legal certification attesting to having mailed the Complainant the requested record on February 6, 2007 in accordance with the Council's January 31, 2007 Interim Order.

Based on the legal certification of the Custodian dated February 20, 2007, the Custodian has complied with the Council's January 31, 2007 Interim Order within the required time frame.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that pursuant to the Custodian's February 20, 2007 certification, the Custodian has complied with the Council's January 31, 2007 Interim Order within the required time frame.

Approved By:

Catherine Starghill, Esq.  
Executive Director

February 21, 2007

## INTERIM ORDER

### January 31, 2007 Government Records Council Meeting

James Donato  
Complainant

Complaint No. 2005-182

v.

Township of Union  
Custodian of Record

At the January 31, 2007 public meeting, the Government Records Council (“Council”) considered the January 24, 2007 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:

- 4) Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records. Therefore, the Custodian unlawfully denied access to the requested records.
- 5) **The Custodian shall provide the requested records to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction within five (5) business days from receipt of the Council’s Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director.**
- 6) The Custodian erroneously believed that the Complainant’s request was not specific enough. Though this belief may be classified as negligent or heedless, it does not contain the element of conscious wrongdoing needed in order to find a knowing and willful violation of OPRA. Therefore, the Custodian’s actions do not constitute a knowing and willful violation of OPRA.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 2007

Vincent P. Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: February 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 31, 2007 Council Meeting**

James Donato<sup>4</sup> (on behalf of Capitol Publishing)<sup>5</sup>      GRC Complaint No. 2005-182

**Complainant**

v.

**Township of Union<sup>6</sup>**  
*Custodian of Records*

**Records Relevant to Complaint:**

All motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005.

*Request Made: September 15, 2005*

*Response Made: September 23, 2005*

*Custodian: Eileen Birch*

**GRC Complaint Filed:** September 28, 2005

**Background**

**September 15, 2005**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests motor vehicle accident reports for a specified period of time.

**September 23, 2005<sup>7</sup>**

Custodian's<sup>8</sup> response to the OPRA request six (6) business days after the request. The Custodian informs the Complainant that the request for motor vehicle accident reports is not specific enough. The Custodian asks that the requestor provide specific dates, times, locations or police incident numbers in order for this request to be filled.

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<sup>4</sup> Request filed by Alberto Fusco of Capitol, Inc. However, he is no longer employed by that company.

<sup>5</sup> No attorney listed.

<sup>6</sup> Custodian represented by Francis D. McIntyre, Esq. of McIntyre and Kirshenbaum, LLC located in Springfield, NJ.

<sup>7</sup> The letter is undated but the Denial of Access Complaint states that the Custodian's response was received on September 23, 2005.

<sup>8</sup> Signed by Sgt. James Purcell.

September 28, 2005

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

- September 15, 2005 Complainant’s OPRA request, and
- September 23, 2005 Custodian’s response to the OPRA request.

The Complainant contends that although the Custodian asserts that the request was not specific enough, the records request is specific as it identifies a specific type of record created over a specific period of time. The Complainant asserts that the Custodian can easily locate the requested records by using the dates provided in the records request.

September 29, 2005

**Offer of Mediation sent to both parties.**

**September 29, 2005**

Complainant’s signed Mediation Agreement. The Custodian did not agree to mediate this Complaint.

**November 22, 2005**

Request for Statement of Information sent to the Custodian.

**December 6, 2005**

Custodian’s Statement of Information (“SOI”) with the following attachments:

- September 15, 2005 Complainant’s OPRA request, and
- September 23, 2005 Custodian’s response to the OPRA request.

The Custodian certifies that the Township does not maintain motor vehicle reports separate from other incident reports. The Custodian asserts that all police reports are catalogued by incident numbers and not the type of incident, which would require him to go through the reports to ascertain which ones are responsive to the request. The Custodian states that the Complainant was asked to provide more specific information regarding the requested incident reports so that the records could be provided. The Custodian asserts that rather than supplying a response to the Custodian’s request for clarification, the Complainant filed a denial of access complaint. The Custodian also asserts that the Complainant is not the one who filed the OPRA request. Therefore, the Custodian contends that this complaint is invalid.

**October 18, 2006**

Complainant’s letter to the GRC. The Complainant states that he would like to proceed with the adjudication of this complaint. The Complainant also asserts that he is the Complainant on this case because the original requestor is no longer employed by



Capitol Publishing, Inc. Additionally, the Complainant asserts that the original requestor made the request on behalf of Capitol Publishing, Inc.

## Analysis

### Whether the Custodian unlawfully denied access to the requested motor vehicle accident reports?

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.

The Custodian asserts that all police reports are catalogued by incident numbers and not the type of incident which occurred, so he would be required to go through all incident reports to ascertain which ones are responsive to the request. The Custodian certifies that the Township does not maintain motor vehicle reports separate from other incident reports. The Custodian states that the Complainant was asked to provide more specific information regarding the requested incident reports so that the records could be provided. The Custodian states that no response was received from the Complainant.

The Complainant contends that although the Custodian asserts that the request was not specific enough, the records request is specific as it identifies a specific type of record created over a specific period of time. The Complainant asserts that the Custodian can easily locate the requested records by using the dates provided in the records request.

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. 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 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 (March 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Pursuant to Mag, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as "to go or look through carefully in order to find something missing or lost."<sup>9</sup> The word *research*, on the other hand, means "a close and careful study to find new facts or information."<sup>10</sup>

The records request in this complaint is for "identifiable" government records (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). Therefore, the Custodian may have to search her files to find or locate those identifiable requested records, but the Custodian does not have to research her files to figure out which records, if any, might be responsive to the request. The request is not broad or unclear. The request is for specifically named records. Thus, Mag does not upset the Custodian's obligation to fulfill the OPRA request. The Custodian may have needed to request an extension of the statutory response time to fulfill the request due to the amount of time she needed to spend searching her files in order to find or locate the identifiable government records requested. However, the Custodian failed to do so in this instance.

**Whether the Custodian's delay in access to the requested records 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:

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<sup>9</sup> "Search." Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006 .

<sup>10</sup> "Research." Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd .

“[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.

The Custodian asserts that all police reports are catalogued by incident numbers and not the type of incident which occurred, so he would be required to go through all incident reports to ascertain which ones are responsive to the request. The Custodian certifies that the Township does not maintain motor vehicle reports separate from other incident reports. The Custodian states that the Complainant was asked to provide more specific information regarding the requested incident reports so that the records could be provided. The Custodian states that no response was received from the Complainant. The Complainant contends that although the Custodian asserts that the request was not specific enough, the records request is specific as it identifies a specific type of record created over a specific period of time. The Complainant asserts that the Custodian can easily locate the requested records by using the dates provided in the records request.

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 at 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 (App. Div. 1996) at 107).

Here, the Custodian erroneously believed that the Complainant’s request was not specific enough. Though this belief may be classified as negligent or heedless, it does not contain the element of conscious wrongdoing needed in order to find a knowing and

willful violation of OPRA. Therefore, the Custodian's actions do not constitute a knowing and willful violation of OPRA.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

- 7) Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records. Therefore, the Custodian unlawfully denied access to the requested records.
- 8) **The Custodian shall provide the requested records to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director.**
- 9) The Custodian erroneously believed that the Complainant's request was not specific enough. Though this belief may be classified as negligent or heedless, it does not contain the element of conscious wrongdoing needed in order to find a knowing and willful violation of OPRA. Therefore, the Custodian's actions do not constitute a knowing and willful violation of OPRA.

Prepared By:

Colleen C. McGann  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

January 24, 2007