

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 08761-05S

AGENCY DKT. NO. 2005-101

THOMAS NEFF/REPUBLICAN
OFFICE OF GENERAL ASSEMBLY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF
LAW & PUBLIC SAFETY,

Respondent.

Mary C. Beaumont, Chief Counsel, for petitioner

Lisa Puglisi, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney
General of New Jersey, attorney)

Record Closed: May 8, 2006

Decided: June 8, 2006

BEFORE **JEFF S. MASIN**, ALJ:

This contested case involves a dispute concerning the petitioner's request for records under N.J.S.A. 47:1A-1 et seq., the Open Public Records Act ("OPRA"). Petitioner Thomas Neff, acting on behalf of the Republican Office of the New Jersey General Assembly, made the request to the Custodian of Records for the respondent Department of Law and Public Safety ("L&PS"), Bruce Solomon. As will be seen, Mr. Solomon supplied some of the records sought, but then directed Mr. Neff elsewhere to seek additional records that Mr. Solomon denied were within the scope of his custodial responsibility. Mr. Neff disputes the legality of this response under OPRA. He filed a complaint, No. 2005-101, with the Government Records Council ("GRC") on May 23, 2005. The GRC's Executive Director issued Findings and Recommendations for the Council's October 28, 2005 meeting. The Executive Director recommended that the GRC determine that Mr. Solomon violated N.J.S.A. 47:1A-5.e., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1-5.i. This determination was made due to the lack of any written response conveying a reason for a denial or delay in access to the requested records within the statutorily required time.

In addition, the Executive Director reported that, as the parties to the complaint presented differing information regarding the OPRA request, the GRC staff could not make a determination on access. The Executive Director therefore recommended that the case be transferred to the Office of Administrative Law ("OAL") for a hearing. The GRC agreed with this recommendation and transmitted the case to the OAL on November 21, 2005. Following pre-hearing conferences and discussions between counsel and their clients, the parties have stipulated to certain facts and have filed briefs on the legal issues. Oral argument was held on May 8, 2006, on which date the record closed.

The request at issue was filed by Mr. Neff on behalf of the Republican Office of the General Assembly on February 22, 2005. The Republican Office was preparing for budget hearings for the FY 2006 budget. As the Stipulation of Facts agreed to by the parties and adopted herein sets forth, the initial request, identified as Request W13325, included a section that sought

Any and all documents relating to the pre-payment of, payment of, and/or reimbursement for, food, drink, entertainment, transportation, lodging and travel with respect to all unclassified and senior executive service employees, including but not limited to the Attorney General during the period from and including January 1, 2003, until present day.

Such documents should include but not be limited to: reimbursements, direct payment vouchers, pre-payment vouchers, or other vouchers and voucher reimbursements; receipts; requests for reimbursement; purchase or other requisitions; payment approvals and authorizations; supporting financial records; and any and all related correspondence, letters and memoranda. All documents should be in such format as to clearly identify the beneficiaries of such expenditures.

As the Stipulation explains, after some communication between Mr. Neff and Bruce Solomon, who is the custodian of records for the Office of the Attorney General ("OAG")ⁱ and the Department of Law and Public Safety, Office of the Attorney General, the original request W13325, which also demanded significant additional materials, was reformatted into five separate OPRA requests. Of these, the present matter involves only request W13355, which is the first paragraph, quoted above, of the prior request W13325. Further,

ⁱ The respondent identifies the OAG as providing administrative support to the Attorney General and coordinating the administration of the divisions and agencies of the Department. N.J.A.C. 13:1E-1.2.

as the Stipulation explains, after communication between Messrs. Neff and Solomon, the request was further narrowed, such that Mr. Neff sought only the travel records of the Attorney General, the First Assistant Attorney General, the Department Administrator and the Division Directors of the various divisions of the Department of Law and Public Safety.ⁱⁱ It is the request for the records pertaining to this latter group, the Division Directors, that has resulted in the contested case, for, as stipulated, after some time Mr. Solomon explained to Mr. Neff that while the OAG had access to computer screens containing some information regarding travel by the Attorney General, the First Assistant Attorney General, the Department Administrator and the L&PS Division Directors, the OAG did not make, maintain or keep on file, nor had it received, backup travel documentation for Division Directors outside of OAG. OAG was in possession of detailed backup travel documentation only for employees within OAG; in this case, the Attorney General, the First Assistant Attorney General and the Department Administrator. Mr. Solomon advised Mr. Neff that if he sought the detailed backup records for Division Directors outside of the OAG, "he would have to file OPRA requests directly with those divisions." Mr. Neff did not agree with this response and pressed his request for the backup travel records for the Division Directors, with the exception of the Director of the Division of Alcoholic Beverage Control, Mr. Fisher. Mr. Solomon then collected, redacted and provided the backup travel documents for the Attorney General, First Assistant Attorney General and the Department Administrator for Fiscal Years (FY) 2003, 2004 and 2005, totaling over 1,700 pages. Finally, Mr. Solomon again informed Mr. Neff that OAG did not make, maintain, or keep the backup travel records for the Division Directors and that he would have to request these from the specific divisions in question. It is noted that at no point did L&PS contend that the records sought either did not exist or were not government records or were not lawfully sought by the requestor. The primary element of the dispute is over who had the responsibility to produce them for the petitioner.

The entire Stipulation of Facts follows:

ⁱⁱ According to its brief, L&PS has ten divisions. These are Division of Alcoholic Beverage Control, Division on Civil Rights, Division of Consumer Affairs, Division of Gaming Enforcement, Division of Criminal Justice, Division of Elections, Division of Highway Traffic Safety, Division of Law, Racing Commission, and the Division of State Police. It also includes five independent agencies. These are Victims of Crime Compensation Board, Election Law Enforcement Commission, Executive Commission on Ethical Standards, Juvenile Justice Commission and Office of the Child Advocate.

1. Bruce Solomon is the custodian of records for the Office of the Attorney General ("OAG") and the Department of Law and Public Safety.
2. On February 22, 2005, Thomas Neff of the Assembly Republican Office filed a Request for Information under the Open Public Records Act with the Department of Law and Public Safety, Office of the Attorney General. The confirmation number given to that Request was W13325.
3. Request W13325 sought access to government records in five separate and distinct subject areas:

A. Any and all documents relating to the pre—payment of, payment of, and/or reimbursement for, food, drink, entertainment, transportation, lodging and travel with respect to all unclassified and senior executive service employees, including but not limited to the Attorney General during the period from and including January 1, 2003, until present day.

Such documents should include but not be limited to: reimbursements, direct payment vouchers, pre-payment vouchers, or other vouchers and voucher reimbursements; receipts; requests for reimbursement; purchase or other requisitions; payment approvals and authorizations; supporting financial records; and any and all related correspondence, letters, and memoranda. All documents should be in such format as to clearly identify the beneficiaries of such expenditures.

B. Any and all documents evidencing the expenditure of funds for televisions, rugs, and conference tables or office desks since January 1, 2003.

Such documents should include but not be limited to: reimbursements, direct payment vouchers, pre-payment vouchers, or other vouchers and voucher reimbursements; receipts; requests for reimbursement; purchase or other requisitions; payment approvals and authorizations; supporting financial records; and any and all related correspondence, letters, and memoranda. All documents should be in such format as to clearly identify the vendors providing such equipment.

C. Any and all of the documents listed below with respect to grants or loans awarded from: the \$10.0 million FY 2005 appropriation entitled "Statewide Local Domestic Preparedness Equipment Grant Program"; the \$7.0 million FY

2005 appropriation entitled "Statewide Local Domestic Preparedness Equipment Grant Program";

- i) applications; and
- ii) written letters or emails received from the Governor, staff of the Office of Governor, and any legislator with respect to an application for, or recipient of, grants or loans; and
- iii) evidence of payment, including notice of award; and
- iv) grant or loan documents.

D. A listing of all private sector law firms that have been retained by the State since January 1, 2003 together with a brief description of the services provided by each firm, the date of retention, and the hourly rate of compensation or other fee arrangement.

E. Requisitions for payment submitted since January 1, 2003 by any and all private sector law firms for work done on behalf of the School Construction Corporation, including, but not limited to, law firms that handle condemnation proceedings, together with documentation showing the amount paid for each requisition.

4. On February 22, 2005, Mr. Solomon called Mr. Neff to discuss the breadth and scope of his OPRA request to OAG. As a result of the telephone conversation, on February 22, 2005, Mr. Neff withdrew request W13325 and filed five separate OPRA requests with OAG, W13355, W13356, W11357, W13358 and W13360, which were worded identically to the five numbered paragraphs in his original OPRA request.

5. Mr. Neff did not authorize any payment for the costs entailed by his OPRA requests.

6. Request W13355, which was the first paragraph of his initial request, is the only OPRA request at issue in the present matter.

7. As originally written, W13355 sought "any and all" travel records for "all unclassified and senior executive service employees" in L&PS.

8. Mr. Solomon informed Mr. Neff that there are approximately 5,770 unclassified employees in L&PS, including 834 Deputy Attorneys General and 2,826 State Troopers, which were included under his OPRA request.

9. On various dates in March 2005, between March 2 and March 23, Mr. Solomon and Mr. Neff had a number of discussions in an attempt to narrow

the scope of the request.

10. After these discussions, Mr. Neff narrowed the scope of his request to include the travel records of the Attorney General, the First Assistant Attorney General, the Department Administrator and L&PS Division Directors.

11. Mr. Neff and Mr. Solomon agreed that, as a starting point to fulfilling the request, the OAG, Fiscal Unit, would prepare a report summarizing the travel expenses for the Attorney General, the First Assistant Attorney General, the Department Administrator and the L&PS Division Directors.

12. On April 27, 2005, Mr. Solomon received an initial computer report from OAG Fiscal summarizing the travel expenses of the Attorney General, the First Assistant Attorney General, the Department Administrator and the L&PS Division Directors. Upon reviewing the report, Mr. Solomon concluded that it required further refinement and more detail before it could be released, because the report did not accurately reflect a portion of reimbursements for expenses.

13. On April 27, Mr. Solomon left a phone message on Mr. Neff's voice mail, explaining the situation and requesting an extension of time to produce the report. On April 28, Mr. Neff left Mr. Solomon a voice mail message, agreeing to an extension of time. On April 29, Mr. Solomon left Mr. Neff a voice mail message, updating him on the status of the request.

14. Mr. Neff agreed to extend the deadlines for the request, at Mr. Solomon's request, when necessary. Mr. Neff indicated to Mr. Solomon that the requested documents were needed as soon as possible so that he would have enough time beforehand to prepare briefing material for members of the General Assembly prior to an Assembly Budget Committee meeting to examine the L&PS proposed budget that was scheduled for 10 a.m. on May 19, 2005. Mr. Neff has agreed to drop any and all claims with respect to the timeliness of any and all responses to the request.

15. On the morning of May 5, Mr. Solomon e-mailed the OPRA receipt and nine page report from OAG to Mr. Neff.

16. While working with OAG Fiscal on preparing the travel expense report, Mr. Solomon was informed that although OAG Fiscal had access to computer screens concerning travel by the Attorney General, the First Assistant Attorney General, the Department Administrator and the L&PS Division Directors, OAG did not make, maintain or keep on file, nor had it received backup travel documentation for Division Directors outside of OAG. OAG was in possession of detailed backup travel documentation only for employees within OAG; in this case, the Attorney General, the First Assistant Attorney General and the Department Administrator.

17. Mr. Solomon informed Mr. Neff of this information in late April and again in early May, and advised him that if he sought detailed travel backup records for Division Directors outside of OAG, he would have to file OPRA requests directly with those divisions. Mr. Neff expressed his dissatisfaction with this response.

18. On May 5, 2005, the day he was provided with the summary report, Mr. Neff emailed Mr. Solomon, informing him that he continued to seek access to the backup travel records of the Attorney General, the First Assistant Attorney General, the Department Administrator and all of the L&PS Division Directors, with the exception of former First Assistant Neafsey and ABC Director Fischer. Mr. Solomon informed him that although OAG would provide the backup documentation for the Attorney General, the First Assistant Attorney General and the Department Administrator, OAG was not in possession of backup travel records for Division Directors outside of OAG and therefore Mr. Neff would need to file OPRA requests with those divisions if he sought access to those records.

19. In response to Mr. Neff's email of May 5, Mr. Solomon proceeded to collect, collate, review and redact the backup travel records of the Attorney General, the First Assistant Attorney General and the Department Administrator for FY 2003, FY 2004 and FY 2005, which totaled over 1,700 pages.

20. The records included home addresses, social security numbers, and credit card information, which Mr. Solomon redacted. Mr. Solomon completed the redaction on May 17, 2005.

21. On the afternoon of May 17, Mr. Solomon contacted Mr. Neff and advised him that the documents were available for his inspection. On May 18, 2005 at 3:15 p.m., Mr. Neff went to Mr. Solomon's office in the Justice Complex, where he was provided with a hard copy of the redacted backup travel records of the Attorney General, the First Assistant Attorney General and the Department Administrator for FY 2003, FY 2004 and FY 2005.

22. On May 18, Mr. Solomon again informed Mr. Neff that OAG did not make, maintain, or keep on file the backup travel records for Division Directors outside of OAG and repeated that if he sought access to such records, he would need to file OPRA requests with the specific divisions in question.

When the GRC transmitted the contested case to the OAL, it specified several questions to be determined.ⁱⁱⁱ However, when the parties conferenced the case with the administrative law judge, they agreed that the three issues in dispute were

ⁱⁱⁱ a. What records are being sought in the February 22, 2005 OPRA request?

b. What records are made, maintained or kept on file, or received by the L&PS and are under the responsibility of the Custodian?

1. What records are made, maintained or kept on file, or received by the L&PS and are under the responsibility of the Custodian?
2. What fees, if any, should be assessed for records still outstanding and not already provided in response to the request pursuant to N.J.S.A. 41:1A-5?
3. If all requested records were not provided, what is the basis for not providing access to OPRA or any other law?

It is important to note that the petitioner has specifically waived any issue regarding the timeliness of the L&PS response to the OPRA request. Thus, at the present time the parties have focused upon the question of whether Mr. Solomon's response that Mr. Neff had to seek the backup travel documents from the various divisions through their individual custodians of records was a legally appropriate response under OPRA, or whether the filing of the request with Mr. Solomon was sufficient under the Act to compel him to undertake the task of compiling a full response to the request without any reference of Mr. Neff to any other person or division within L&PS. Pursuant to OPRA the responsibility for proving any claimed exemption by the Custodian for the responsibility to supply the records requested lies with the custodian. N.J.S.A. 47:1A-6.

The Open Public Records Act, N.J.S.A. 47:1A-1.1, contains relevant definitions.

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

....

"Public agency" or "agency" means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or

c. Whether the request was too broad in scope that it required clarification pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005). If the request was sufficiently clarified by the Complainant for the Custodian to fulfill the request and were the requested records provided based on the clarified request?

d. What records were provided to the Complainant in response to the OPRA request and of the record provided were all records responsive to the OPRA request and under the responsibility of the L&PS Custodian?

e. What fees, if any, should be assessed for records still outstanding and not already provided in response to the request pursuant to N.J.S.A. 41:1A-5?

f. If all requested records were not provided, what is the basis for not providing access pursuant to OPRA or any other law?

agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

. . . .

“Government record” or “record” means any paper, written or printed book. . . that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency, or authority of the State . . . or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State

The designation of a custodian of records for L&PS is required both by OPRA and the proposed L&PS regulations, which provides at N.J.A.C. 13:1E-2.2 that the “Attorney General shall designate a custodian of records for the Department of Law and Public Safety, who shall be responsible for requests for access to government records of the Office of the Attorney General.” The same proposed regulation provides that “each Division director, agency director or governing body, as the case may be, shall designate a custodian of records or designee who shall be responsible for requests for access to records held or controlled by that division or agency.” [Department of Law and Public Safety/Office of the Attorney General Jointly Proposed New Rules: N.J.A.C. 13:1E-2 and 3, PRN 2002-227, July 1, 2002]. Thus, the proposed rules contemplate an arrangement regarding the custody of and responsibility for records of the OAG and the divisions which mirrors the response provided by Mr. Solomon, that is; as the designated custodian of records for L&PS, he was responsible only for supplying the records kept, held and maintained by OAG and not for those kept, held and maintained by the divisions, each of whom was responsible, through the designated custodian of records or designee of each division, for the custody of all records kept, held and maintained by such division and for the provision of such records in response to an OPRA request. As this proposed regulation established his role, Mr. Solomon’s designation as the custodian of records for L&PS was then something less than it might seem from the title, for his responsibility for responding to requests for government records was limited to those at OAG. L&PS argues that this arrangement is clearly permissible under OPRA, for in defining a public

agency the law does not limit that term as applying, on the State level, to only the principal departments of the executive branch such as L&PS, but also includes within its definition specific reference to “any division, board, bureau, office, commission or other instrumentality within or created by such [principal] department . . .” Further, the definition of a custodian of records for a public agency other than a municipal government provides for such an official as “the officer officially designated by formal action of that agency’s director or governing body, as the case may be.” Since by definition an “agency” may include the divisions within a principal department of the executive branch, as well as the principal department itself, there is no impropriety in designating individual custodians for any of the individual divisions within L&PS. While L&PS could have presumably chosen to name only one custodian of records for the entire department, it chose instead to follow a different arrangement, one which is perfectly permissible under OPRA.^{iv} And to the extent that it has published proposed regulations governing its choice as to how to arrange for custodians for its records, it argues that the proposal, published well before the onset of this controversy, has the force of law, citing Executive Order 26 (McGreevey), paragraph 6. The Executive Order provides that a department or agency may

adopt rules and regulations prior to its final adoption. Therefore, pursuant to Paragraph 4 of EO 21, public “agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published . . . “ Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division-Mercer County, Docket No. MER-L-1090-05 (Decided July 5, 2005) at page 11].

The Newark Morning Ledger Co. opinion has been relied upon by the GRC in a decision, Amy Vasquez v. Burlington County Custodian of Record, Complaint N. 2005-193, Final Decision dated February 17, 2006.

^{iv} This arrangement defines the responsibility of the custodian such that while OAG “provides administrative support to the Attorney General and coordinates the administration of the divisions and agencies in the Department,” its custodians role is specifically limited and placed in a context of other custodians with responsibility for those divisions and agencies. Whether Mr. Solomon acts in any department-wide manner to coordinate the understanding of the law and of responsibilities thereunder by the several custodians is not part of the record.

In summary, L&PS argues that Mr. Neff and the Republican Office cannot dictate to it how exactly it should structure its process for receiving and responding to OPRA requests, so long as the procedures it has chosen to adopt comply with the Act. While, at oral argument the deputy attorney general and Mr. Solomon, who was present, appeared to agree that the designation he bears as custodian of records for L&PS and OAG may create some confusion, nevertheless they see no problem as far as compliance with the Act in the fact that his responsibility is limited by the regulation to OAG records and does not include responsibility for the records kept, held and maintained by the separate divisions of L&PS. L&PS contends that it fosters efficiency by the arrangement it has adopted, as the individual custodians of records for its various divisions can more readily respond to requests for the records requested relevant to the specific division, where they are maintained. Indeed, L&PS goes so far as to argue that, given the size of L&PS and the diverse nature of its many constituent divisions, were Mr. Solomon responsible for the records of the entire department, such an arrangement would run counter to the express intent of OPRA to foster rapid response to requests for government records.

The petitioner argues that the “balkanized” arrangement adopted by L&PS is not in conformance with the goals or the requirements of OPRA. OPRA’s declared intent is to establish “the public policy of this State that government records shall be readily accessible for inspection, copying or examination by the citizens of this State; with certain exceptions, for the protection of the public interest, and any limitation on the right of access accorded by [the statute], shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. It is this “ready access” requirement that petitioner sees as suffering interference by the respondent’s conduct in response to petitioner’s request for records. In its brief, the petitioner first focuses on the argument that “there should be one central records custodian to handle and distribute OPRA requests for the Department.” It is simply too cumbersome a task for the citizen requesting information from government to have to deal with multiple custodians for the ten divisions and four agencies housed under the L&PS umbrella. Implicit in OPRA is the requirement for one central custodian “to review, facilitate and forward, if necessary, OPRA requests” While in the present instance petitioner does not suggest that Mr. Solomon was personally responsible to actually perform all of the labor

required to gather all of the records sought and concedes that he could lawfully delegate that task to others, nevertheless, the law required that he “review that request and ensure that the appropriate documents were provided.” If the respondent’s position is accepted, that is, if departments such as L&PS are not required to designate one “central” custodian, then the public’s ability to obtain “ready access” will be frustrated. They will be forced to “navigate the bureaucracy of the department on [their] own, theoretically being directed to dozens or even hundreds of records custodians for each department of State government . . .”

The problem with this argument is that while the Legislature could have written the definition of a State-level public agency as including only the principal departments and thus required that each principal department designate a single custodian of records for that department, the Legislature did not do so. Instead, it very specifically defined the term “public agency” so as to include both the principal departments and the divisions thereof, and the definition of “custodian of records” is written so as to require that each “public agency” may designate its own custodian. This is not to say that in the exercise of discretion the head of a principal department, such as the Attorney General for L&PS, could not decide that there would be only one “department-wide” custodian with total responsibility for OPRA requests for the entire department, but nothing in the legislation dictates such a decision. It may be presumed that the legislation provided discretion to the agencies to decide exactly how to structure their ability to respond to OPRA requests in a timely manner because each principal department is different and the agency heads have a far more intimate knowledge of the internal structures and personnel of their respective agencies than the Legislature had. While time and experience might suggest that a structure first adopted need be changed to deal with problems that might develop in meeting OPRA’s demands in a timely and effective manner commensurate with the goals of the statute, the legislation itself did not mandate the exact pattern to be followed by each principal department. Thus, as written, OPRA allows the L&PS to have separate custodians of records for each division and while Mr. Solomon’s title may imply total responsibility for the records of the entire LP&S, the stated limitation of his actual sphere of responsibility in the proposed regulations does not violate OPRA, so long as the Department has also provided for custodians responsible for its several divisions. Further, despite implications in the petitioner’s brief, there is no evidence in the record of any intent by the Department to purposely interfere with the rights afforded under OPRA, and whether the structure presently in place at L&PS or the department-wide, single-responsible-custodian structure advocated by the petitioner actually presents a better opportunity for

prompt response in the best interests of the public cannot be determined from this one instance and from the record in this case.

The petitioner also argues that OPRA recognizes that at times requests for records will be filed with the wrong person at a public agency, someone who is not designated as the custodian of records for that agency. In such instances the Act provides two options to be followed. "Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J.S.A. 47:1A-5h. In this case, on April 27th, Mr. Solomon, claiming that he was not the custodian of the records for the backup travel documents kept, held and maintained not by OAG, but instead by the several other divisions of L&PS, advised Mr. Neff that he would have to file OPRA requests with the separate divisions to obtain the travel records. Thus, to the extent that Mr. Solomon disclaimed responsibility under OPRA for supplying the division directors' backup travel records, which he asserted were neither made, maintained, kept or received by the OAG for whose records he was responsible, he chose the second option allowed under OPRA, that is, he directed the requestor to the persons who L&PS contends were the appropriate custodians of the records requested, the designated custodians of each of the divisions for whose directors such information was sought. Initially, if petitioner's contention that Mr. Solomon was the sole responsible custodian for the records of all LP&S divisions is correct, then certainly his referral of Mr. Neff to other persons to obtain the records was legally unsupportable under OPRA. However, if L&PS is correct and there is no flaw in its limiting of Mr. Solomon's responsibility and its designation of "other" as the separate divisions' records custodians, then Mr. Solomon's choice to refer Mr. Neff to the proper custodians rather than to personally forward the requests appears to be permitted under the Act, which provides for alternative solutions to the problem of a request given to the wrong official or employee and does not require that the official or employee who mistakenly receives the OPRA request must himself forward the request to the proper custodian. Yet, the petitioner argues that Mr. Solomon's failure to himself facilitate the response by forwarding the OPRA request to the proper custodians clearly violated OPRA,

for it “delayed” and “frustrated” the prompt response expected by the Act, placing an “unreasonable burden” on the public’s access to government records. Additionally, to the extent that Mr. Solomon did supply some travel data for division directors that he did have computer screen access to, petitioner argues he should not then be permitted to rely on a claim that the remaining backup records sought were not accessible to him. “Such circular reasoning places an undue burden on the public’s right to access to government records pursuant to OPRA, in clear violation of the law’s provisions.”

Once again, had the Legislature determined that each employee or official of any public agency should be personally responsible for facilitating OPRA requests by personally forwarding the request that the employee or official received to the custodian of records the Legislature could have provided for that to be the only acceptable response for an employee or official to take. It did not do so. Instead, it provided a choice, and here Mr. Solomon exercised his choice and chose to direct Mr. Neff to the individual division custodians. In doing so, he acted within the allowable range of conduct permitted by the Legislature. That he did have some limited capacity to obtain and provide computer stored material summarizing the travel reimbursements for the division directors to which he had ready access from OAG Fiscal does not vitiate the fact that the backup documents sought by Mr. Neff were not themselves within OAG’s possession, nor kept by OAG.

The petitioner cites Meyers v. Borough of Fair Lawn, GRC Case No. 2005-127, decided December 8, 2005, in support of the proposition that the location of records sought is not a factor that excuses the custodian of records from the responsibility to provide records legitimately sought under OPRA. In Meyers, the records sought from the custodian were in part stored on the mayor’s personal computer. The court concluded that to the extent that these were records that were “government records” under the statutory definition, the custodian was responsible for their production. But Meyers does not address the fundamental issue herein, for in that case, there was no dispute that if the e-mails stored on the mayor’s personal computer were government records, the request for their production had been filed with the appropriate custodian. In the present matter, as previously stated, if Mr. Solomon is deemed the custodian for all records of L&PS, then the

location of the backup documents is not a factor in the need for him to provide them, but if Mr. Solomon is not the custodian for all of L&PS, but only for OAG, then to the extent that there are other appropriate custodians responsible for the production of these backup documents kept and maintained by the separate divisions the request filed with Mr. Solomon is not the proper vehicle for obtaining their production and Meyers is not a relevant precedent.

For the reasons stated, I **CONCLUDE** that the respondent has established that Mr. Solomon acted in accordance with OPRA when he provided Mr. Neff with the materials made, maintained, kept or received by OAG, but directed him to the designated records custodians for the several divisions within L&PS for the records sought that were made, kept and maintained by the individual divisions. Each of these divisions was by statute authorized and by regulation required to have its own designated custodian of records and nothing in OPRA required that there be one, central custodian with total responsibility for all of the records made, kept and maintained throughout the entire principal department.

As noted above, in addition to the issues relating to whether Mr. Solomon properly responded to the OPRA request, and to the extent that he did not provide requested records, whether he had a lawful basis for not doing so, the parties agreed that there was a third remaining issue. This was, what fees, if any, should be assessed for records still outstanding and not already provided in response to the request pursuant to N.J.S.A. 47:1A-5? It is not clear at this time exactly what the dispute over this question may be about. Since the records not yet provided were not sought from the proper custodian, any request directed to the appropriate division custodians must of course be answered. It is unclear what the extent of any such appropriate response may produce in terms of the quantity and form of such records. The extensive response provided by Mr. Solomon regarding only the Attorney General, First Assistant Attorney General and Department Administrator suggests that a full response as to backup documents for each of the division directors is likely to be substantial. The statute provides for certain charges for each page of a response. Depending upon the nature of the record sought and the format in which it is sought, costs of conversion may be assessed, and extraordinary expenditures

required may be charged as well in the form of a “special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. . . .” N.J.S.A. 47:1A-5c. Since there is at present no basis for knowing either what will be produced or what charges the divisions will request, and as the parties have understandably presented no proofs on this matter, nothing more will be said. Of course, if disputes over charges do arise, they may need to be resolved in further proceedings.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DATE

GOVERNMENT RECORDS COUNCIL

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None