



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 31, 2007 Government Records Council Meeting

John Bart

Complainant

v.

City of Paterson Housing Authority (Passaic)

Custodian of Record

Complaint No. 2007-133

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 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:

1. Because the Complainant is clearly not seeking records which would contain any personal information pertaining to any individual, the Custodian unlawfully denied access to the Complainant's OPRA request by requiring the Complainant to indicate whether or not he had been convicted of an indictable offense.
2. Based on the Council's decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b.
3. Because the Custodian provided the Complainant with the requested records one (1) business day following the receipt of the Complainant's resubmitted OPRA request (even though the Custodian unlawfully denied access to the Complainant's OPRA request dated May 11, 2007) and because the Custodian properly charged the copy costs enumerated in N.J.S.A. 47:1A-5.b., 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 31st Day of October, 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
Government Records Council

Decision Distribution Date: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**John Bart, Esq.¹
Complainant**

GRC Complaint No. 2007-133

v.

**City of Paterson Housing Authority (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Computer disk copy of the current Public Housing Admissions and Continued Occupancy Policy
2. Computer disk copy of the current Administrative Plan for the Section 8 Housing Choice Voucher Program
3. Photocopy of chapters 10 through 13 of the current Public Housing Admissions and Continued Occupancy Policy
4. Photocopy of chapters 14 and 15 of the current Administrative Plan for the Section 8 Housing Choice Voucher Program

Request Made: May 11, 2007 and May 17, 2007

Response Made: May 15, 2007 and May 17, 2007

Custodian: Gwendolyn Morrison

GRC Complaint Filed: May 29, 2007

Background

May 11, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

May 15, 2007

Custodian Counsel's response to the OPRA request. Counsel responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. Counsel states that the Complainant's OPRA form is incomplete and requests that the Complainant indicate whether he has or has not been convicted of any indictable offense. Additionally, Counsel requests clarification regarding the Complainant's request. Counsel states that the requested records are in the process of being updated and cannot be released until approved by the Board of Commissioner.

¹ No legal representation listed on record.

² Represented by Daniel J. McCarthy (Cranford, NJ).

Counsel requests that the Complainant clarify whether he is requesting copies of the records prior to revisions.

May 17, 2007

Letter from Complainant to Custodian's Counsel. The Complainant asserts that based on the records he is requesting, the reason for the Housing Authority's refusal to process the Complainant's request is not grounds for a denial of access. The Complainant states that the Housing Authority is aware that the Complainant is a licensed attorney in New Jersey and directs Counsel to N.J.S.A. 47:1A-2.2(a). Additionally, the Complainant requests that Counsel provide him with sworn statements by agency personnel setting forth the search undertaken to satisfy the Complainant's request, the records responsive to the request, a statement of the agency's record retention/destruction policy and the last date on which records that may have been responsive to the request were destroyed. The Complainant clarifies that his OPRA request is for the most current records to date. The Complainant also states that he has never been convicted of any indictable offence under the laws of New Jersey, any other state, the U.S. or any foreign country. (The Complainant resubmitted his OPRA request with his letter).

May 17, 2007

Custodian's response to the Complainant's OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day following receipt of such request. The Custodian states that the Housing Authority does not maintain copies of the requested records on computer disk. The Custodian requests that the Complainant advise if he wishes to receive hard copies of said records. The Custodian also states that the requested photocopies are available for pickup and were last revised in October 2006.

May 29, 2007

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

- Complainant's OPRA request dated May 11, 2007
- Letter from Custodian's Counsel to Complainant dated May 15, 2007
- Certified Mail Return Receipt addressed to Executive Director of City of Paterson Housing Authority dated May 16, 2007
- Letter from Complainant to Custodian's Counsel dated May 17, 2007
- Custodian's OPRA request dated May 17, 2007
- Custodian's response to the Complainant's OPRA request dated May 17, 2007
- Certified Mail Return Receipt addressed to Custodian's Counsel dated May 18, 2007
- City of Paterson Housing Authority payment receipt dated May 18, 2007
- Certified Mail Return Receipt addressed to Executive Director of City of Paterson Housing Authority dated May 21, 2007
- Certified Mail Return Receipt addressed to Custodian dated May 21, 2007

The Complainant states that he submitted his OPRA request on May 11, 2007 which included a request that the Custodian not charge more than the actual cost of copying the requested records. The Complainant states that he received a response from

the Custodian's Counsel dated May 15, 2007 requesting that the Complainant indicate whether or not he has been convicted of any indictable offense before the Housing Authority can process the request. The Complainant states that he resubmitted his OPRA request on May 17, 2007 indicating that he has never been convicted of an indictable offense. The Complainant also states that the Custodian's Counsel contacted him on May 17, 2007 stating that the May 15, 2007 response was not a denial of access and that the requested records would be available the next day. Additionally, the Complainant states that the Custodian charged the maximum copying rates outlined in OPRA rather than the actual cost of copying.

June 14, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

June 25, 2007

Request for the Statement of Information sent to the Custodian.

June 29, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated May 11, 2007
- Letter from Custodian's Counsel to Complainant dated May 15, 2007
- Custodian's response to the Complainant's OPRA request dated May 17, 2007

The Custodian certifies receiving the Complainant's OPRA request on May 11, 2007. The Custodian certifies that she made at least two (2) phone calls to the Complainant in order to determine whether the Complainant was requesting updated policy manuals or manuals that had been in place since October 2004. The Custodian certifies that when these phone calls were not returned, the Housing Authority requested clarification from the Complainant in writing and also requested that the Complainant completely fill out the OPRA request form. The Custodian certifies that the Complainant responded in writing on or about May 16, 2007. Additionally, the Custodian certifies that the Complainant and the Custodian's Counsel had a conversation in which Counsel advised the Complainant that the Housing Authority was not denying the request, but was seeking clarification and advising that the requested records are not maintained in electronic form. The Custodian certifies that the Complainant indicated that he was requesting the most updated copies of the requested records.

The Custodian also certifies that on May 17, 2007 she provided the Complainant with a written response to his OPRA request indicating that the requested records were available for pickup and that the records were not maintained in electronic format. The Custodian certifies that on May 18, 2007 someone from the Complainant's staff picked up the records. The Custodian asserts that pursuant to N.J.S.A. 47:1A-5(h)³ the Complainant received the requested records within the required seven (7) business days.

³ The applicable provision of OPRA is actually N.J.S.A. 47:1A-5.i.

The Custodian states that the Complainant alleges that his OPRA request was denied because the Housing Authority requested that the Complainant completely fill out the OPRA request form. The Custodian asserts that the Complainant believes he is exempt from completing the form because he is an attorney and a known individual to the Housing Authority. The Custodian contends that N.J.S.A. 47:1A-2.2(a) does not exempt the Complainant from completing the OPRA form. Further, the Custodian certifies that it was not the intention of the Housing Authority to deny the Complainant's request for failing to complete the form but rather to maintain a uniform procedure for all individuals who submit OPRA requests.

The Custodian also states that the Complainant contends that he should not have been charged the minimum copying rates but rather the actual costs. The Custodian states that pursuant to N.J.S.A. 47:1A-5.b., the actual cost of copying records is applicable if the fee is not prescribed by law or regulation. The Custodian states that said provision also provides that the actual costs do not apply when there is a fee otherwise provided by statute. The Custodian also states that OPRA provides that the fees for copies shall not exceed \$0.75 for the first to tenth page, \$0.50 for the eleventh to twentieth page and \$0.25 for all pages over twenty. The Custodian certifies that she charged the Complainant the OPRA copying rates pursuant to N.J.S.A. 47:1A-5.b. and asserts that said charge is proper. The Custodian requests that this complaint be dismissed because she responded to the Complainant's request within the required time period pursuant to N.J.S.A. 47:1A-5(h)⁴ and charged the proper copy fees pursuant to N.J.S.A. 47:1A-5.b.

July 4, 2007

The Complainant's response to the Custodian's SOI. The Complainant contends that because he was not seeking records containing personal information pertaining to the victim of a crime, the Housing Authority had no basis for requesting that the Complainant identify whether or not he had been convicted of an indictable offense. The Complainant states that because of the Housing Authority's May 15, 2007 denial of the Complainant's OPRA request, the Complainant was forced to submit a new request on May 17, 2007.

Additionally, the Complainant states that his issue with the copy costs is that the Custodian did not charge the actual costs as was requested in the Complainant's OPRA request. The Complainant asserts that the Custodian incorrectly refers to "minimum cost" outlined in N.J.S.A. 47:1A-5.b. when the statute really describes the maximum costs. The Complainant states that the Custodian has failed to state her actual costs pursuant to N.J.S.A. 47:1A-5.b. for copying one 8 ½ by 11 inch sheet of white paper with black text on it. The Complainant contends that the Custodian should be found to have knowingly and willfully violated OPRA and unreasonably denied access to the requested records for charging more than the actual costs of copying.

⁴ The applicable provision of OPRA is actually N.J.S.A. 47:1A-5.i.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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 also provides that:

“...where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in [OPRA] ... shall be denied.” N.J.S.A. 47:1A-2.2(a).

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

Further, N.J.S.A. 47:1A-2.2(a) provides that a person who is convicted of any indictable offense shall be denied access to records when the records requested contain personal information pertaining to the person's victim or the victim's family.

In this complaint, the Complainant requested planning and policy records from the Housing Authority on May 11, 2007. The Custodian's Counsel denied the Complainant's OPRA request on May 15, 2007 because the Complainant did not identify whether or not he had been convicted of an indictable offense.

Although it is reasonable for a custodian to require that a requestor complete an OPRA request form in its entirety including the question of whether the requestor has been convicted of an indictable offense, said question is designed to prohibit convicts from gaining access to records relating to the victim(s) of his/her crime, because such access is a violation of OPRA.

The Complainant has not requested records which would contain any personal information pertaining to any individual. As such, the Custodian would not need to know whether the Complainant had been convicted of an indictable offense. Thus, the Custodian's Counsel had no legal basis to deny the Complainant's request because the Complainant had not indicated whether or not he had been convicted of an indictable offense.

Therefore, because the Complainant is clearly not seeking records which would contain any personal information pertaining to any individual, the Custodian unlawfully denied access to the Complainant's OPRA request by requiring the Complainant to indicate whether or not he had been convicted of an indictable offense.

Whether the Custodian violated OPRA by charging the Complainant the copy costs enumerated in N.J.S.A. 47:1A-5.b. rather than the actual cost of copies?

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy of copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a few is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to

charge the actual cost of duplicating the record.” (Emphasis added).
N.J.S.A. 47:1A-5.b.

The Complainant contends that he was not charged the actual cost of copying the requested records, as was requested in his OPRA request dated May 11, 2007, but rather was charged the enumerated rates established in OPRA.

OPRA provides that a requestor may purchase copies of government records upon payment of the actual cost of said copies, unless a fee is prescribed by law or regulation.
N.J.S.A. 47:1A-5.b.

In John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Council reviewed a New Jersey Superior Court Trial Division decision that addressed the same or similar issues that are in this complaint currently before the Council. The Council held that:

[w]hile the Trial Division determined that the actual cost of duplicating the record, which presumably might be less than the enumerated rates listed in OPRA, is the appropriate statutory interpretation of OPRA, the Council should look to other precedential case law to interpret the copying cost provision of OPRA. Specifically, the Supreme Court of New Jersey in Dickinson v. Fund for Support of Free Public School, 95 N.J. 65, 469 A.2d 1 (December 1983) held that it is a ‘golden rule’ of interpretation, fully applicable to constitutional as well as statutory documents, that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. 2A Sutherland, Statutory Construction § 45.12 at 37 (4 ed. Sands 1973); Clifton v. Passaic Cty. Bd. of Taxation, 28 N.J. 411, 421 (1958) (‘A construction ‘calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible,’” quoting Elizabeth Federal Savings & Loan Ass’n v. Howell, 24 N.J. 488, 508 (1957)); see Kervick v. Bontempo, *supra*, 29 N.J. 469.

It is unreasonable to assume that every records custodian, especially those in small municipalities with limited photocopy equipment and other resources, are able to adequately or accurately determine the actual copying cost of government records when doing so requires an estimate of the number of government records which will be requested annually divided by an estimated annual actual cost of photocopy paper and ink. Therefore, it is more likely, and consistent with the ‘golden rule of statutory interpretation’ adopted by the Supreme Court of New Jersey in Dickinson, *supra*., that the unreasonableness of a particular result arising from the selection of one among several possible alternative interpretations strongly militates in favor of the adoption of an interpretation that embraces a reasonable result. Adopting the interpretation of the copying cost provision in OPRA which allows records

custodians to charge the enumerated rates for copies of government records is the reasonable result.

Therefore, based on the Council's decision in Windish, the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b.

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 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).

While the Custodian unlawfully denied access to the Complainant's OPRA request dated May 11, 2007 by requiring that the Complainant indicate whether or not he had been convicted of an indictable offense, the Custodian fulfilled the Complainant's OPRA request on May 18, 2007, one (1) business day following the receipt of the Complainant's resubmitted OPRA request. Additionally, based on the Council's decision in Windish, the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b.

Because the Custodian provided the Complainant with the requested records one (1) business day following the receipt of the Complainant's resubmitted OPRA request (even though the Custodian unlawfully denied access to the Complainant's OPRA request dated May 11, 2007) and because the Custodian properly charged the copy costs enumerated in N.J.S.A. 47:1A-5.b., 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant is clearly not seeking records which would contain any personal information pertaining to any individual, the Custodian unlawfully denied access to the Complainant's OPRA request by requiring the Complainant to indicate whether or not he had been convicted of an indictable offense.
2. Based on the Council's decision in John Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the Custodian may charge the copy costs enumerated in N.J.S.A. 47:1A-5.b.
3. Because the Custodian provided the Complainant with the requested records one (1) business day following the receipt of the Complainant's resubmitted OPRA request (even though the Custodian unlawfully denied access to the Complainant's OPRA request dated May 11, 2007) and because the Custodian properly charged the copy costs enumerated in N.J.S.A. 47:1A-5.b., 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007