



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 31, 2007 Government Records Council Meeting

Karen Marcinczyk
Complainant

Complaint No. 2007-128

v.

Township of East Brunswick (Middlesex)
Custodian of Record

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 as amended. The Council, therefore, finds that:

1. The Complainant’s records request dated May 3, 2007 was not a valid OPRA request and as such the Custodian’s refusal to fulfill said request does not amount to an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.f., N.J.S.A. 47:1A-5.g., Mag Entertainment LLC v. Div. of ABC, 375 N.J. Super 534 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005), Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Tina Renna v. County of Union Docket No. Union-L-1145-06 (Law Div. 2007).
2. Although the Custodian lawfully denied access to the Complainant’s request on the basis that said request was not on an official OPRA request form, the Custodian unlawfully denied access to the requested Certificate of Occupancy by requiring that the Complainant obtain written permission from the property owner. While the Custodian’s unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law, such apparent negligence paired with the Custodian’s lawful denial of access does not amount to 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 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**

**Karen Marcinczyk¹
Complainant**

GRC Complaint No. 2007-128

v.

**Township of East Brunswick (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Certificates of Occupancy for 9 and 9A Washington Avenue, East Brunswick, NJ.

Request Made: May 3, 2007

Response Made: May 14, 2007

Custodian: Edward J. Grobelny

GRC Complaint Filed: May 20, 2007

Background

May 3, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter request for records.

May 14, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the Complainant's request must be submitted on an approved East Brunswick Township OPRA request form which the Custodian states he provided to the Complainant in his letter dated April 3, 2007. The Custodian also states that the OPRA request form must also contain the property owner's written permission to release any files or copies.

May 20, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Custodian's letter to the Complainant dated May 14, 2007.³ The Complainant states that she is a renter of the apartment located at 9A Washington Avenue East Brunswick, NJ. The Complainant states that the Custodian denied access to the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant did not attach a copy of her May 3, 2007 OPRA request to her Denial of Access Complaint.

Certificate of Occupancy status records by requiring the property owner's written permission to release the requested records.

June 25, 2007

Custodian's certification with the following attachments:

- Letter from Custodian to Complainant dated April 3, 2007
- Letter from Custodian to Complainant dated May 14, 2007

The Custodian certifies that on April 30, 2007 and May 14, 2007 he responded to the Complainant's request for information regarding the apartment the Complainant is renting at 9A Washington Avenue in East Brunswick, NJ. The Custodian certifies that he informed the Complainant that pursuant to the Township's policy for obtaining information, the Complainant needed to submit an OPRA request form to the Township Clerk's office. The Custodian also certifies providing the Complainant with a copy of the Township's OPRA request form with his response.

Analysis

What constitutes a valid OPRA records request?

Review of the OPRA statute and its legislative intent leads the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the

statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999) (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If the custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor on the request form* and promptly *return it to the requestor*. The custodian *shall sign and date the form and provide the requestor with a copy thereof*. (Emphasis added.)
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form and return it to the requestor would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA’s central purpose of making government records “readily accessible” to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of promoting the legislative policy that a requestor must specifically describe identifiable records sought. *See* Mag Entertainment LLC v. Div. of ABC, 375 N.J. Super 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor’s general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for

a “brief description” of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records. Further, in NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the court held that the requestor’s “...five (5) page, thirty nine (39) paragraph request bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form...” Additionally, in Tina Renna v. County of Union Docket No. Union-L-1145-06 (Law Div. 2007), the court held that “[it] makes sense to the legislation as a whole only if the written request for a public record is made on the agency’s form.”

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency’s official OPRA records request form. OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form. Thus, the Custodian acted appropriately by forwarding the official OPRA records request form to the Complainant on April 3, 2007.

Therefore, the Complainant’s records request dated May 3, 2007 was not a valid OPRA request and as such the Custodian’s refusal to fulfill said request does not amount to an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.f., N.J.S.A. 47:1A-5.g., Mag Entertainment LLC v. Div. of ABC, 375 N.J. Super 534, 546 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Tina Renna v. County of Union Docket No. Union-L-1145-06 (Law Div. 2007).

Whether the Custodian’s requirement that the Complainant obtain the signature of the property owner in order to release the requested Certificate of Occupancy amounts to an unlawful denial of access pursuant to OPRA?

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.

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.

Although the Custodian was proper in denying the Complainant's request because said request was not submitted on an official OPRA request form, the Custodian also denied the Complainant's request because the Complainant did not obtain written permission from the property owner to release the requested Certificate of Occupancy.

N.J.S.A. 47:1A-1.1 provides that "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added).

The provisions of OPRA do not exempt from public access a Certificate of Occupancy if the requestor has not obtained written permission from the property owner. Additionally, the Custodian has not cited any other statute, regulation or Executive Order indicating same but instead indicated that it was the Township's policy to require the property owner's signature to release a Certificate of Occupancy.

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).

Although the Custodian lawfully denied access to the Complainant's request on the basis that said request was not on an official OPRA request form, the Custodian unlawfully denied access to the requested Certificate of Occupancy by requiring that the Complainant obtain written permission from the property owner. While the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law, such apparent negligence paired with the Custodian's lawful denial of access does not amount to 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 Complainant's records request dated May 3, 2007 was not a valid OPRA request and as such the Custodian's refusal to fulfill said request does not amount to an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.f., N.J.S.A. 47:1A-5.g., Mag Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005), Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Tina Renna v. County of Union Docket No. Union-L-1145-06 (Law Div. 2007).
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Prepared By:

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Approved By:

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Executive Director

October 24, 2007