



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

May 28, 2008 Government Records Council Meeting

John A. Bart, Esq.

Complainant

v.

Passaic County Public Housing Agency

Custodian of Record

Complaint No. 2007-215

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 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’s OPRA requests are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008). However, the Custodian’s written response to the Complainant’s request in which the Custodian provided records that are not responsive to the Complainant’s request is insufficient pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Custodian did not unlawfully deny access to the requested records, because the Complainant’s OPRA requests are not requests for specific identifiable government records, as well as because the Custodian is not required to conduct research in response to an OPRA request and as such the Complainant’s requests are invalid, 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 insufficient response of providing records which are not responsive to the Complainant’s request rather than requesting



clarification of said request appears negligent and heedless since he 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 28th Day of May, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**John A. Bart, Esq.¹
Complainant**

GRC Complaint No. 2007-215

v.

**Passaic County Public Housing Agency²
Custodian of Records**

Records Relevant to Complaint:

1. The Passaic County Housing Agency signs currently posted in conformance with N.J.S.A. 47:1A-5.j.
2. All Passaic County Housing Agency signs that have been posted in conformance with N.J.S.A. 47:1A-5.j. since July 7, 2002.

Request Made: August 6, 2007

Response Made: August 15, 2007

Custodian: Angel Roman

GRC Complaint Filed: September 21, 2007

Background

August 6, 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.

August 15, 2007

Passaic County Public Housing Agency's ("PHA") Response to the OPRA request.³ The PHA responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The PHA states that copies of the following signs which are posted throughout the PHA's office are enclosed and are being provided free of charge:

- Fair Housing Booklet – It's Your Right
- Applying for HUD Assistance (English and Spanish)
- Discrimination Notice (Spanish)
- Know About Fraud or Waste

¹ No legal representation listed on record.

² Represented by Joseph Greer, Esq. (Paterson, NJ).

³ Said response was provided to the Complainant by Brenda Prince, Administrative Secretary.

August 20, 2007

Letter from Complainant to Custodian. The Complainant states that the PHA's response dated August 15, 2007 is not responsive to the Complainant's request because none of the signs provided relate to N.J.S.A. 47:1A-5.j. The Complainant asks that the Custodian respond to the Complainant's OPRA request.

September 21, 2007

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

- Complainant's OPRA request dated August 6, 2007
- PHA's response to the Complainant's request dated August 15, 2007
- Letter from Complainant to Custodian dated August 20, 2007

The Complainant states that he submitted his OPRA request on August 6, 2007 and received a response from the PHA via letter dated August 15, 2007. The Complainant states that the PHA did not provide any records responsive to his request nor did the PHA advise as to whether any such records exist.

October 4, 2007

Offer of Mediation sent to both parties. Neither party responded to the Offer of Mediation.

October 25, 2007

Request for the Statement of Information sent to the Custodian.

November 7, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on October 25, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

November 9, 2007

Custodian's incomplete Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on October 12, 2007 and that he did not provide the Complainant with a response to said request.⁴

November 13, 2007

Letter from GRC to Custodian. The GRC states that it provided the Custodian with a request for a Statement of Information on October 25, 2007 and November 7, 2007 and is in receipt of the Custodian's incomplete SOI dated November 9, 2007. The GRC states that it advised the Custodian in its letter dated October 25, 2007 that an incomplete

⁴ The facts to which the Custodian certified do not match the facts of this complaint.

SOI will be returned for completion. The GRC asks that the Custodian return his completed SOI to the GRC within three (3) business days.⁵

November 14, 2007

Letter from Dolores Choteborsky, Passaic County Public Information Officer, to Complainant. The Public Information Officer states that her office received the Complainant's OPRA request, which she researched and pursuant to which she is providing the Complainant with two (2) pages responsive to his request free of charge.

November 14, 2007

Letter from Dolores Choteborsky, Passaic County Public Information Officer, to GRC. The Public Information Officer states that she provided the Complainant with the requested records via letter dated November 14, 2007.

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:

“[i]f 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 ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than*

⁵ The GRC did not receive the Custodian's completed SOI.

seven business days after receiving the request ... (Emphasis added.)
N.J.S.A. 47:1A-5.i.

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. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ The custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Complainant states that he submitted his request on August 6, 2007. The Complainant states that he received a response from the PHA via letter dated August 15, 2007, the seventh (7th) business day following the Custodian’s receipt of said request, in which the PHA granted access to records that are not responsive to the Complainant’s request, but did not grant access to the records requested or indicate whether said records exist. The Public Information Officer, however, provided the Complainant with the records requested via letter dated November 14, 2007.

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

⁶ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ..." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (October 2005)⁷, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired..."⁸

Additionally, the court in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) cited Mag by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, the GRC previously ruled on whether a request for records created pursuant to a particular statute is a valid request under OPRA in Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008). In said complaint, the Complainant submitted numerous requests for records which may have been required to be created under federal rules. The Council held that:

"[b]ecause the Complainant's OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)..."

The Council reasoned that:

"[w]hile some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant's requests cites to a definitional regulation rather than a regulation that requires the creation of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, *the fact that the Custodian would have to research the federal regulations cited by the Complainant to*

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent.

determine whether said regulations require that a record be created places an undue burden on the Custodian.” (Emphasis added).

The complaint at issue here can be slightly distinguished from Taylor, *supra*, in that the requests in Taylor relate to federal rules with which the Custodian may not be familiar and thus would require the Custodian to research said rules in order to comply with the Complainant’s request. Additionally, not all of the federal rules cited by the Complainant require that a record be created.

In this current complaint, however, the Complainant’s request is for a sign posted in conformance with OPRA. Custodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law. Also, the OPRA provision cited by the Complainant mandates that a record exist. Specifically, N.J.S.A. 47:1A-5.j. provides that:

“[a] custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.”

However, the court cases listed above specifically state that a custodian is not required to conduct research in response to an OPRA request. The court in Mag, *supra*, does not qualify the extent of research custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. Mag, *supra*, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant’s request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute. Although the Public Information Officer ultimately provided the Complainant with the requested records, neither she nor the Custodian were required to conduct research in order to fulfill the Complainant’s requests.

Therefore, because the Complainant’s OPRA requests are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, *supra*, Bent, *supra*, NJ Builders, *supra*, and Taylor, *supra*. However, the Custodian’s written response to the Complainant’s request in which the Custodian provided records that are not responsive to the Complainant’s request is insufficient pursuant to N.J.S.A. 47:1A-5.g.

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:

“[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).

In this complaint, the Complainant submitted his OPRA request on August 6, 2007 and received a written response from the Custodian on the seventh (7th) business day following the Custodian’s receipt of said request in which the Custodian provided the Complainant with records that are not responsive to the Complainant’s request. The Public Information Officer, however, provided the Complainant with the records responsive approximately three (3) months following the Custodian’s receipt of said request and after the Public Information Officer researched the Complainant’s request. As previously stated in the analysis above, neither the Custodian nor the Public Information Officer were required to conduct research in response to the Complainant’s request.

Therefore, because the Custodian did not unlawfully deny access to the requested records, because the Complainant’s OPRA requests are not requests for specific

identifiable government records, as well as because the Custodian is not required to conduct research in response to an OPRA request and as such the Complainant's requests are invalid, 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 insufficient response of providing records which are not responsive to the Complainant's request appears negligent and heedless since he 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's OPRA requests are not requests for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008). However, the Custodian's written response to the Complainant's request in which the Custodian provided records that are not responsive to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g.

2. Because the Custodian did not unlawfully deny access to the requested records, because the Complainant's OPRA requests are not requests for specific identifiable government records, as well as because the Custodian is not required to conduct research in response to an OPRA request and as such the Complainant's requests are invalid, 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 insufficient response of providing records which are not responsive to the Complainant's request rather than requesting clarification of said request appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008