



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

June 25, 2008 Government Records Council Meeting

Thomas Driscoll
Complainant

Complaint No. 2007-300

v.

School District of the Chathams (Morris)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 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. The Complainant’s November 21, 2007 OPRA request sought “copies of any government record” and referenced the definition of a government record set forth at N.J.S.A. 47:1A-1.1., but failed to identify any specific type of government record or a timeframe within which the records may have been created. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether such records related to “copies of any government record,” this request is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). *But see* Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008)(finding that because the Complainant identified a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant’s OPRA request and the first two (2) meetings after October 1, 2006), the request was not overly broad or unclear) *See also* Vercammen v. Linden Police Department, GRC Complaint No. 2002-103 (December 2002). Further, the Custodian has borne his burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, requesting 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).

3. Although the Custodian in this complaint failed to respond in writing stating that records responsive to Items No. 1 and No. 2 do not exist, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Item No. 1 and No. 2 did not exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian’s failure to provide a written response to the Complainant’s November 21, 2007 OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial even though no records responsive existed as of the date of the Complainant’s OPRA request, the Custodian did provide records responsive once those records were provided to the Board of Education. Therefore, 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 “deemed” 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.

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 25th Day of June, 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: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**Thomas Driscoll¹
Complainant**

GRC Complaint No. 2007-300

v.

**School District of the Chathams (Morris)²
Custodian of Records**

Records Relevant to Complaint: Copies of any government record relating to the proposal to light Cougar and/or Haas fields. The request includes but is not limited to:

1. Any documentation or copies related to the 4-pole lighting proposal that was presented to the Board of Education (“BOE”) by the Booster group.
2. Any documentation, maps, etc., related to the 4-pole lighting proposals developed by MUSCO, a field lighting design company.³

Request Made: November 21, 2007

Response Made: November 26, 2007

Custodian: Ralph H. Goodwin

GRC Complaint Filed: December 6, 2007

Background

November 21, 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.

November 26, 2007

Custodian’s Response to the OPRA request. The Custodian responds to the Complainant’s OPRA request on the second (2nd) business day following receipt of such request. The Custodian verbally informs the Complainant that records responsive to request Items No. 1 and No. 2 do not exist.⁴

¹ No legal representation listed on record.

² Represented by Nicholas Celso III, Esq., of Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Morristown, NJ).

³ The request relevant to this complaint also included two (2) other items that are not at issue in this complaint.

⁴ The Custodian provides access to records not at issue in this complaint.

December 6, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated November 21, 2007.⁵

The Complainant states that he submitted a request to the Custodian on November 21, 2007. The Complainant further states that the Custodian responded on November 26, 2007. The Complainant states that he received the records responsive to two (2) items not at issue in this complaint but that the Custodian denied access to request Items No. 1 and No. 2, asserting that no records responsive existed. The Complainant further contends that the Custodian ignored the initial portion of the request which asked for any government record relating to the proposal to light Cougar and/or Haas fields.

The Complainant did not agree to mediate this complaint.

December 18, 2007

Request for the Statement of Information sent to the Custodian.

December 20, 2007

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel states that the BOE will be closed for the holidays beginning December 21, 2007 and requests a reasonable extension of time to submit the Statement of Information until January 8, 2008.⁶

December 20, 2007

E-mail from GRC to the Custodian’s Counsel. The GRC grants the Custodian an extension until January 8, 2008 to file the Statement of Information.

January 8, 2008

Custodian’s Statement of Information (“SOI”) attaching the Complainant’s OPRA request dated November 21, 2007.

The Custodian certifies that his search for the requested records included searching the BOE records and archives.

The Custodian’s Counsel states that the Complainant filed an OPRA request on November 21, 2007 for four (4) separate sets of records. The Custodian’s Counsel states that at the time of the request the Custodian was only able to provide the records not at issue in this complaint. The Custodian’s Counsel avers that the Custodian was unable to provide any records responsive to request Items No. 1 and No. 2 because no written proposal or documentation had been submitted to the BOE regarding the lighting project at the time of the Complainant’s November 21, 2007 OPRA request.

⁵ The Complainant also attaches records which are not at issue in this complaint.

⁶ The Custodian’s Counsel requests an extensive amount of time because the Custodian must prepare Statements of Information for a total of four (4) Denial of Access complaints filed by the Complainant. Those three (3) other complaints are being adjudicated separately as Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-301, Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-302 and Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 2007-303.

The Custodian's Counsel contends that the Custodian cannot be expected to disclose records that do not exist. The Custodian's Counsel further asserts that, despite not being able to disclose any records at the time of the Complainant's OPRA request, the Custodian did provide records responsive to request Items No. 1 and No. 2 once such records were obtained by the BOE.

Additionally, the Custodian's Counsel avers that the GRC is statutorily precluded from adjudicating this complaint because the Complainant affirmatively acknowledged on the Denial of Access Complaint that an action has also been brought before the New Jersey Superior Court. The Custodian's Counsel contends that the GRC previously held that it may not adjudicate a complaint when the Complainant affirmatively acknowledges that a complaint was also instituted in Superior Court pursuant to Fajerman v. Monmouth County, GRC Complaint No. 2005-167 (March 2006) and Mosee v. Atlantic City Police Department, GRC Complaint No. 2005-33 (September, 2005). The Custodian's Counsel also contends that the language in N.J.S.A. 47:1A-6 is clear that a requestor may either institute a proceeding in the Superior Court or file a complaint with the GRC but not both.

May 14, 2008

E-mail from the GRC to the Complainant. The GRC requests that the Complainant advise whether the action filed in Superior Court concerns this records request or any records sought in it.

May 14, 2008

E-mail from the Complainant to the GRC. The Complainant states that the affirmative acknowledgement of a pending action in Superior Court was a mistake.

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 seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of 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.

The Complainant asserts that the Custodian ignored the Complainant’s initial portion of the November 21, 2007 OPRA request, which states:

“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 in the course [of] official business that relates to the proposal... [t]his request includes but is not limited to...”

This paragraph does not identify any specific government record but rather sets forth the definition of a government record as it appears in N.J.S.A. 47:1A-1.1.

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 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, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁸ *Id.*

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court 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..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

In the complaint now before the Council, the Complainant's November 21, 2007 OPRA request sought "copies of any government record" and referenced the definition of a government record set forth at N.J.S.A. 47:1A-1.1., but failed to identify any specific type of government record or a timeframe within which the records may have been created. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether such records related to "copies of any government record," this request is invalid because it is overly broad pursuant to MAG, *supra* and Bent, *supra*. *But see* Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008)(finding that because the Complainant identified a type of government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant's OPRA request and the first two (2) meetings after October 1, 2006), the request was not overly broad or unclear) *See also* Vercammen v. Linden Police Department, GRC Complaint No. 2002-103 (December 2002). Further, the Custodian has borne his burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Moreover, the Custodian in this case failed to respond in writing to the Complainant's November 21, 2007 OPRA request.

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

⁸ As stated in Bent.

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.⁹ Regardless of the vagueness of an OPRA request, the Custodian is statutorily mandated to seek clarification for any requests deemed broad or unclear within seven (7) business days. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, requesting 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 supra.

Nevertheless, in the matter before the Council, the Custodian certified that no records responsive to the Complainant's OPRA request Items No. 1 and No. 2 existed at the time of the request. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that although the Custodian failed to respond within the statutorily mandated time frame, there was no unlawful denial of access to the requested record because the Custodian certified that no records responsive existed.

Therefore, although the Custodian in this complaint failed to respond in writing stating that records responsive to Items No. 1 and No. 2 do not exist, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Item No. 1 and No. 2 did not exist. See Pusterhofer, supra.

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:

⁹ 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.

“... 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’s failure to provide a written response to the Complainant’s November 21, 2007 OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial even though no records responsive existed as of the date of the Complainant’s OPRA request, the Custodian did provide records responsive once those records were provided to the BOE. Therefore, 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 “deemed” 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant’s November 21, 2007 OPRA request sought “copies of any government record” and referenced the definition of a government record set forth at N.J.S.A. 47:1A-1.1., but failed to identify any specific type of government record or a timeframe within which the records may have been created. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether such records related to “copies of any government record,” this request is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). *But see* Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (April 2008)(finding that because the Complainant identified a type of

government record (resolutions and executive meeting minutes) within a specific date (the most recent meeting prior to the Complainant's OPRA request and the first two (2) meetings after October 1, 2006), the request was not overly broad or unclear) *See also* Vercammen v. Linden Police Department, GRC Complaint No. 2002-103 (December 2002). Further, the Custodian has borne his burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

2. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, requesting 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).
3. Although the Custodian in this complaint failed to respond in writing stating that records responsive to Items No. 1 and No. 2 do not exist, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Item No. 1 and No. 2 did not exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's November 21, 2007 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial even though no records responsive existed as of the date of the Complainant's OPRA request, the Custodian did provide records responsive once those records were provided to the Board of Education. Therefore, 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 "deemed" 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.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008