



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 23, 2009 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2007-321

v.

Township of Livingston (Essex)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 2009 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. Although the Custodian properly responded in writing requesting an extension of one (1) week to respond to the Complainant’s October 2, 2007 OPRA request on the fourth (4th) business day after receipt of such request, the Custodian’s failure to respond in writing within the extended one (1) week time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Complainant’s October 1, 2007 and October 2, 2007 OPRA requests seek information rather than identifiable government records, the requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
3. Although the Custodian’s failure to respond in writing to the Complainant’s October 2, 2007 OPRA request within the requested one (1) week extended time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i., because the Complainant’s October 1, 2007 and October 2, 2007 OPRA requests are for information and are therefore invalid requests under OPRA, 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 23rd Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 26, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2007-321

v.

**Township of Livingston (Essex)²
Custodian of Records**

Records Relevant to Complaint:

October 1, 2007 OPRA Request

1. Signs at Livingston Town Center – authorization which allows the following:
 - a. “Shop, Dine, Live” on stoplight at Route 10 and Livingston Avenue.
 - b. Signs providing directions to parking garage.
 - c. Sign at intersection of Route 10 and Livingston Avenue.
 - d. Signs “My Home, My Style, My Retreat.”
2. Appropriation of \$256,000 for Hillside Avenue Construction project.
3. 2007 temporary appropriation and/or emergency appropriation for purchasing agent.

October 2, 2007 OPRA Request

1. Appropriation that corresponds to the grant received for streetscape project.

Request Made: October 1, 2007 and October 2, 2007³

Response Made: October 10, 2007⁴

Custodian: Glenn R. Turtleaub

GRC Complaint Filed: December 19, 2007⁵

Background

October 1, 2007

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to the Complainant’s October 1, 2007 OPRA request listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

³ The Complainant requested additional items that are not at issue in this complaint.

⁴ The Custodian responded on October 10, 2007 to both the October 1, 2007, and October 2, 2007, OPRA requests.

⁵ The GRC received the Denial of Access Complaint on said date.

October 2, 2007

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to the Complainant's October 2, 2007 OPRA request listed above on an official OPRA request form.

October 10, 2007

Custodian's responses to the Complainant's October 1, 2007 and October 2, 2007, OPRA requests.

October 1, 2007 OPRA Request

The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that records responsive to request Item No. 1 are available for review and duplication. The Custodian further requests that the Complainant identify a specific record being sought in request Item No. 2. The Custodian states that records responsive to request Item No. 3 are available for review and duplication.

October 2, 2007 OPRA Request

The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that he will need approximately one (1) week of additional time to respond to request Item No. 1 of this request because the Custodian's Counsel must review the records responsive to determine whether redactions are necessary.

October 17, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that he has not been provided access to records from request Item No. 1 and No. 2 of the October 1, 2007, OPRA request. The Complainant asserts that while the Custodian has provided a redevelopment plan and amendment responsive to request Items No. 1, the Complainant was not shown specific applications or approvals for the signs' references. The Complainant finally states that one (1) week has passed since the Custodian requested an extension of time to respond to the Complainant's October 2, 2007, OPRA request and the Complainant has not yet been provided with access to the requested records.

November 12, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that all request items relevant to this complaint in the October 1, 2007 and October 2, 2007 OPRA requests have not yet been provided.

October 1, 2007, OPRA request Item No. 1

The Complainant states that he reviewed eight (8) pages of records on October 17, 2007. The Complainant asserts that none of the records contained authorizations regarding the signs at Livingston Town Center.

October 1, 2007, OPRA request Item No. 2 and No. 3

The Complainant states that he was not provided with any records responsive to request Item No. 2. Further, the Complainant states that he inspected records on October 17, 2007, but none of the records provided contained the specific information responsive to request Item No. 3.

October 2, 2007, OPRA request

The Complainant states that he was not provided any information responsive to this request on October 17, 2007. The Complainant states that the Custodian provided three (3) pages of records on November 5, 2007, but the records did not contain the information responsive to this request.

The Complainant further states that access to some of the requested items has been delinquent for nearly two (2) months.

November 22, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that all request items relevant to this complaint in the October 1, 2007 and October 2, 2007 OPRA requests have not yet been provided. The Complainant further states that access to some of the requested items have been delinquent for more than two (2) months. The Complainant states that in order to expedite the completion of these three (3) requests, if the Custodian has any material or evidence that the Complainant was allowed to review relevant to the requested records, the Custodian should share this evidence with the Complainant as soon as possible.

November 28, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that not all request items relevant to this complaint in the October 1, 2007 and October 2, 2007 OPRA requests have been provided.

December 3, 2007

Letter from the Complainant to the Custodian. The Complainant states that he will be filing a complaint with the GRC and is prepared to file additional complaints unless the current outstanding requests are fulfilled expeditiously.

December 17, 2007

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

- Complainant’s OPRA request dated October 1, 2007.
- Complainant’s OPRA request dated October 2, 2007.
- Letter from the Custodian to the Complainant dated October 10, 2007.
- Letter from the Complainant to the Custodian dated October 17, 2007.
- Letter from the Complainant to the Custodian dated November 12, 2007.

- Letter from the Complainant to the Custodian dated November 22, 2007.
- Letter from the Complainant to the Custodian dated November 28, 2007.
- Letter from the Complainant to the Custodian dated December 3, 2007.

The Complainant contends that he hoped that after repeated reminders the Custodian would have made an effort to comply with OPRA regarding the outstanding items relevant to this complaint in the Complainant's October 1, 2007 and October 2, 2007 OPRA requests. The Complainant asserts that he now considers the Custodian's non-compliance to be a knowing and willful violation of OPRA and an unreasonable denial of access.

The Complainant did not agree to mediate this complaint.

January 15, 2008

Request for the Statement of Information sent to the Custodian.

January 22, 2008

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the Statement of Information.

January 23, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until February 1, 2008 to file the Statement of Information.

February 1, 2008

E-mail from the Custodian to the GRC. The Custodian requests an additional extension of time to submit the Statement of Information because of the Custodian is currently preparing for an election and will not be able to complete the Statement of Information until February 4, 2008.

February 4, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until February 4, 2007 to file the Statement of Information.

February 4, 2008

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

- Complainant's OPRA request dated October 1, 2007.
- Complainant's OPRA request dated October 2, 2007.
- Memo from the Custodian to various City officials dated October 8, 2007.
- Memo from the Custodian to various City officials dated October 8, 2007.
- Letter from the Custodian to the Complainant dated October 10, 2007.

The Custodian certifies that his search for the requested records involved making copies of the OPRA requests as they were received and providing copies of the Complainant's OPRA requests to various City officials and departments that the Custodian believed were most likely to possess any records responsive. The Custodian certifies that the OPRA requests were delivered via memo which also reminded the

various City officials of the Custodian's duty to respond within seven (7) business days granting access, denying access or requesting an extension of time to respond. The Custodian further certifies that he and the Custodian's assistant searched through relevant files for any records requested that were in the possession of the Custodian (i.e., minutes, agendas, resolutions, certificate of availability of funds, contracts, etc.). The Custodian finally certifies that he and the Custodian's assistant followed up with the appropriate City officials to collect records responsive and sought Counsel's review for redactions, if necessary, prior to disclosure.⁶

The Custodian certifies that no records responsive to the Complainant's request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian states each request was handled in the following manner:

October 1, 2007 OPRA request Item No. 1 (Received on October 3, 2007)

The Custodian states that he responded in writing to the Complainant on October 10, 2007, stating that records responsive to Item No. 1 are available for review. The Custodian states that he provided access to the Comprehensive Mixed Use Sign and Awning Package Replacing Section VI.P3 of the Redevelopment Plan (41 pages) on October 17, 2007.

October 1, 2007 OPRA request Item No. 2 (Received on October 3, 2007)

The Custodian states that he responded in writing to the Complainant on October 10, 2007, requesting that the Complainant identify the specific record being sought.

October 1, 2007 OPRA request Item No. 3 (Received on October 3, 2007)

The Custodian states that he responded in writing to the Complainant on October 10, 2007, stating that records responsive to Item No. 3 are available for review. The Custodian states that he provided access to R-07-83 2007 Emergency Temporary Appropriation (6 pages) and R-07-38A 2007 Temporary Appropriation (6 pages) on October 17, 2007.

October 2, 2007 OPRA request (Received on October 3, 2007)

The Custodian states that he responded in writing to the Complainant on October 10, 2007, requesting one (1) additional week to respond. The Custodian states that he provided access to the Capital/Trust Budget Account Status/Transaction Audit Trail

⁶ The Custodian avers that the Complainant does not set forth a specific complaint in GRC Complaint No. 2007-320 et seq., but rather sets forth a compilation of all of his requests from August 16, 2007, to December 4, 2007, in the form of a three (3) page chart. The Custodian further avers that the Complainant followed up his OPRA requests with numerous correspondence in an attempt to clarify his requests, but actually changed the nature of the Complainant's original requests. The Custodian contends that, pursuant to OPRA, a custodian is not required to respond to supplemental information attached to the Complainant's Denial of Access Complaint.

Account C-04-55-005-007-00B (2 pages), Capital Budget 2005 Sheet 40b (1 page) and Dedication by Rider Sheet 38 2006 Audit (1 page) on November 5, 2007.

The Custodian requests that the GRC review the number and frequency of the Complainant's OPRA requests with the Township of Livingston and take into account the numerous items which the Custodian and his staff have satisfied. The Custodian contends that the Complainant has attempted to monopolize the time of the Custodian to the point that a part time staff member had to be hired largely to help handle the Complainant's requests. The Custodian asserts that the Township is doing everything in its ability to be responsive to the Complainant's multiple requests, which regularly and repeatedly seek the same records, in a timely fashion. The Custodian requests that the GRC provide direction on how to best respond to the Complainant's regular requests without disrupting agency operations.

Finally, the Custodian states that he has done everything possible to accommodate the Complainant, including meeting with the Complainant during and after business hours. The Custodian asserts that, for the foregoing reasons, the Township's actions were responsive, proper and not in violation of OPRA.

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* ... If the government record is in storage or archived, the requestor shall be so *advised within seven business days* after the custodian *receives the request*. The requestor shall be advised by the custodian *when the record can be made available*. If the *record is not made available by that time*, access shall be *deemed denied*.” (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 provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the Custodian responded in writing on the fifth (5th) business day after receipt of the Complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the Complainant’s request. However, the Custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i....however...[b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian

violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

In this matter currently before the Council, the Custodian responded in writing to the Complainant’s October 2, 2007 OPRA request seeking an extension of approximately one (1) week. However, the Custodian did not provide any records in response to this request Item until November 5, 2007. As in Kohn, supra, the Custodian requested an additional week to respond to the Complainant’s October 2, 2007, OPRA request within the statutorily mandated time frame, yet failed to provide any records until November 5, 2007, nearly three (3) weeks following the end of the extension of time.

Therefore, although the Custodian properly responded in writing requesting an extension of one (1) week to respond to the Complainant’s October 2, 2007 OPRA request on the fourth (4th) business day after receipt of such request, the Custodian’s failure to respond in writing within the extended one (1) week time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

In the instant matter before the Council, the Complainant’s October 1, 2007 and October 2, 2007 OPRA requests for authorization of signs in Livingston Town Center and appropriations for various projects are requests for information and not identifiable government records.

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 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 (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, and a party cannot satisfy this requirement by simply requesting all of an agency’s documents.”⁸

The Complainant’s October 1, 2007 and October 2, 2007 OPRA requests for “authorizations” and “appropriations” fail to identify specific government records and would require the Custodian to research all files in his possession to locate and identify

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

⁸ As stated in Bent.

responsive records. OPRA does not require that Custodians conduct research to fulfill requests. See MAG, supra and Bent, supra.

Therefore, because the Complainant's October 1, 2007 and October 2, 2007 OPRA requests seek information rather than identifiable government records, the requests are invalid pursuant to MAG, supra, and Bent, supra.

Whether the Custodian's failure to respond in writing to the Complainant's October 2, 2007 OPRA request within the extended one (1) week time frame 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, 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, 107 (App. Div. 1996).

Although the Custodian's failure to respond in writing to the Complainant's October 2, 2007 OPRA request within the requested one (1) week extended time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i., because the Complainant's October 1, 2007 and October 2, 2007 OPRA requests are for information and are therefore invalid requests under OPRA, 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. Although the Custodian properly responded in writing requesting an extension of one (1) week to respond to the Complainant’s October 2, 2007 OPRA request on the fourth (4th) business day after receipt of such request, the Custodian’s failure to respond in writing within the extended one (1) week time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Complainant’s October 1, 2007 and October 2, 2007 OPRA requests seek information rather than identifiable government records, the requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
3. Although the Custodian’s failure to respond in writing to the Complainant’s October 2, 2007 OPRA request within the requested one (1) week extended time frame resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i., because the Complainant’s October 1, 2007 and October 2, 2007 OPRA requests are for information and are therefore invalid requests under OPRA, 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 16, 2009