



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. 2007-322

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. The Custodian’s written response to the Complainant’s requests dated November 6, 2007 and November 8, 2007, in which the Custodian requested an extension of time, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant’s requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he requested an extension of time to respond but failed to provide an anticipated date upon which the requested records would be provided, he did not unlawfully deny access to the record requested in the Complainant’s November 6, 2007 OPRA request Item No. 1 because such records do not exist pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Complainant identified types of records in his November 6, 2007 and November 8, 2007 OPRA requests, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the



Complainant's requests are invalid under OPRA 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, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

4. The Custodian failed to respond in writing to the Complainant's November 6, 2007 OPRA request within the statutorily mandated seven (7) business days and violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records pursuant to Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Complainant's OPRA request items would require the Custodian to research his files and are therefore invalid under OPRA and the Custodian certified in the Statement of Information that no records responsive to the Complainant's November 6, 2007, OPRA request Item No. 1 exist. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by also failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records in the Complainant's November 8, 2007 OPRA request pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008); however, the Complainant's OPRA requests would require the Custodian to research his files and are therefore invalid under OPRA. 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 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. 2007-322

v.

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

Records Relevant to Complaint:

November 6, 2007 OPRA request

1. Minutes of meeting or meetings at which the elected officials approved modifications to Municipal Complex specifications, appointed a negotiating committee and authorization to negotiate.
2. Minutes of meetings or meetings at which elected officials were informed of and discussed law suit, Poppe (Hillside Avenue contractor) plus agenda for such meeting.

November 8, 2007 OPRA request

1. Minutes of meeting or meetings at which decision was discussed and reached to deny Poppe (Hillside Avenue Contractor) full compensation (i.e. without funds) and agenda for such meeting.

Request Made: November 6, 2007 and November 8, 2007³

Response Made: November 21, 2007⁴

Custodian: Glenn R. Turteltaub

GRC Complaint Filed: December 19, 2007⁵

Background

November 6, 2007

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to the Complainant's November 6, 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 November 21, 2007 to both the November 6, 2007, and November 8, 2007, OPRA requests.

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

November 8, 2007

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to the Complainant's November 8, 2007 OPRA request listed above on an official OPRA request form.

November 21, 2007

Custodian's responses to the Complainant's November 6, 2007 and November 8, 2007 OPRA requests.

November 6, 2007 OPRA request

The Custodian responds in writing to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian requests additional time to respond so that Counsel can review the request and advise regarding necessary redactions to any records responsive.

November 8, 2007 OPRA request

The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that he will need additional time to respond to the request because Counsel will need to review the records responsive to determine whether redactions are necessary.

November 28, 2007

Letter from the Complainant to the Custodian. The Complainant asserts that no records responsive to the request items relevant to this complaint in the November 6, 2007 and November 8, 2007 OPRA requests have yet 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 12, 2007

Letter from the Custodian to the Complainant. The Custodian provides an additional response to the Complainant's November 6, 2007 and November 8, 2007 requests.

November 6, 2007 OPRA request Item No. 1 and No. 2

The Custodian states that no records responsive to request Item No. 1 exist. The Custodian states that the following redacted minutes and agendas responsive to request Item No. 2 are available for review and duplication.

- Confidential Council Conference Minutes dated April 28, 2003.
- Confidential Council Conference Minutes dated May 5, 2003.
- Confidential Council Conference Minutes dated November 17, 2003.
- Confidential Council Conference Minutes dated January 12, 2004.

- Confidential Council Conference Minutes dated January 26, 2004.
- Confidential Council Conference Minutes dated May 3, 2004.
- Confidential Council Conference Minutes dated December 6, 2004.
- Confidential Council Conference Minutes dated January 24, 2005.
- Confidential Council Conference Minutes dated March 7, 2005.
- Confidential Council Conference Minutes dated March 21, 2005.
- Confidential Council Conference Minutes dated March 20, 2006.
- Confidential Council Conference Minutes dated January 8, 2007.

November 8, 2007, OPRA request

The Custodian states that the following redacted minutes and agendas responsive to the Complainant's November 8, 2007, OPRA request are available for review and duplication:

- Confidential Council Conference Minutes dated April 28, 2003.
- Confidential Council Conference Minutes dated March 21, 2005.

December 17, 2007

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

- Complainant's OPRA request dated November 6, 2007.
- Complainant's OPRA request dated November 8, 2007.
- Letter from the Custodian to the Complainant dated November 21, 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 November 6, 2007 and November 8, 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 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 November 6, 2007.
- Complainant's OPRA request dated November 8, 2007.
- Letter from the Custodian to the Complainant dated November 21, 2007.
- Letter from the Custodian to the Complainant dated December 12, 2007.

The Custodian certifies that he and the Custodian's assistant searched through relevant files for any minutes and agendas requested that were in the possession of the Custodian.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:

November 6, 2007 OPRA request Item No. 1 (received November 7, 2007)

The Custodian certifies that he responded in writing to the Complainant on November 21, 2007, requesting additional time for Counsel for review and advice regarding any redactions. The Custodian further certifies that he advised the Complainant on December 12, 2007 that no records responsive to this request item exist.

November 6, 2007 OPRA request Item No. 2 (received November 7, 2007)

The Custodian certifies that he responded in writing to the Complainant November 21, 2007, requesting additional time for Counsel to review and advice

⁶ The Custodian avers that the Complainant does not set forth a specific complaint, 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 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.

regarding any redactions. The Custodian certifies that he provided the Complainant with agendas to twelve (12) meetings on November 21, 2007.

The Custodian certifies that he advised the Complainant on December 12, 2007 that records responsive exist and are available for review and duplication with redactions. The Custodian states that the minutes for all twelve (12) meetings were provided on January 4, 2008 with redactions. The Custodian avers that the redactions were made to information which is exempt as litigation and attorney client privileged material, and personnel exemptions pursuant to N.J.S.A. 47:1A-1.1.

November 8, 2007 OPRA request (received November 13, 2007)

The Custodian certifies that he responded in writing to the Complainant on November 21, 2007, requesting additional time for Counsel to review and advice regarding any redactions. The Custodian certifies that he provided the Complainant with agendas to two (2) meetings on November 21, 2007.

The Custodian certifies that he advised the Complainant on December 12, 2007 that records responsive exist and are available for review and duplication with redactions. The Custodian states that the minutes for two (2) meetings were provided on January 4, 2008 with redactions. The Custodian avers that the redactions were made to information which is exempt as litigation material, attorney client privilege and personnel exemptions pursuant to N.J.S.A. 47:1A-1.1.

The Custodian requests that the GRC review the number and scope 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 Custodian's time 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 meeting minutes and agendas?

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.

Further, OPRA 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.

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter currently before the Council, the Custodian responded in writing to the Complainant’s November 6, 2007 OPRA request on the ninth (9th) day after receipt of same, requesting an extension of time to respond to the Complainant’s request because Counsel needed to review any records responsive and advise on necessary redactions. Further, the Custodian responded in writing to the Complainant’s November 8, 2007, OPRA request on the sixth (6th) business day after receipt, requesting an extension of time to respond.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley [v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007)].”

Although the Custodian failed to timely respond to the Complainant’s November 6, 2007 OPRA request, he did respond in a timely manner to the Complainant’s November 8, 2007, OPRA request. However, the facts in Hardwick, *supra*, are similar to the facts in this instant complaint because the Custodian requested an extension of time for both requests but failed to provide an anticipated deadline upon which the records would be made available.

Therefore, the Custodian’s written responses to the Complainant’s OPRA requests dated November 6, 2007 and November 8, 2007 in which the Custodian requested an extension of time, are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, *supra*, because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant’s OPRA requests are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*.

Further, the Custodian responded in writing to the Complainant on December 12, 2007 stating that no records responsive to Item No. 1 of the Complainant's November 6, 2007 OPRA request exist, and subsequently certified in the SOI that no records responsive exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, when the Custodian responded to the Complainant's November 6, 2007 OPRA request, he failed to provide an anticipated deadline date upon which the records responsive to this OPRA request would be made available, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Custodian subsequently responded to the Complainant's November 6, 2007 OPRA request on December 12, 2007 stating that no records responsive to Item No. 1 of the Complainant's OPRA request exist and, further, the Custodian later certified in the SOI that no records responsive to request Item No. 1 exist. There is no credible evidence in the record to refute the Custodian's certifications. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he requested an extension of time to respond but failed to provide an anticipated date upon which the requested records would be provided, he did not unlawfully deny access to the record requested in the Complainant's November 6, 2007, OPRA request Item No. 1 because such records do not exist, pursuant to Pusterhofer, supra.

Moreover, the Complainant's November 6, 2007 and November 8, 2007 OPRA request items identify types of records (meeting minutes and agendas); however, said requests also fail to specify the dates of particular minutes and therefore require the Custodian to research which minutes and/or agendas relate to the approvals, appointments and discussion of matters identified in the Complainant's OPRA requests.

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

Additionally, in New Jersey Builders Association v. New Jersey Council on 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...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that “[b]ecause the Complainant’s OPRA requests [No.] 2-5 are not requests for identifiable government records, the 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 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’⁹ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’¹⁰”

Therefore, although the Complainant identified types of records in his November 6, 2007 and November 8, 2007 OPRA requests, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato, supra. As such, the Complainant’s requests are

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

⁸ As stated in Bent, supra.

⁹ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹⁰ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Larry A. Kohn v. Township of Livingston (Essex), 2007-322 – Findings and Recommendations of the Executive Director

invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Whether the Custodian's inadequate responses to the Complainant's November 6, 2007 and November 8, 2007 OPRA requests 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).

The Custodian failed to respond in writing to the Complainant's November 6, 2007 OPRA request within the statutorily mandated seven (7) business days and violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i by failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records pursuant to Hardwick, supra. However, the Complainant's OPRA request items would require the Custodian to research his files and are therefore invalid under OPRA and the Custodian certified in the SOI that no records responsive to the Complainant's November 6, 2007 OPRA request Item No. 1 exist.

Additionally, the Custodian violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., by failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records in the Complainant's November 8, 2007 OPRA request pursuant to Hardwick, *supra*; however, the Complainant's OPRA request would require the Custodian to research his files and are therefore invalid under OPRA. 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 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 Custodian's written response to the Complainant's requests dated November 6, 2007 and November 8, 2007, in which the Custodian requested an extension of time, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he requested an extension of time to respond but failed to provide an anticipated date upon which the requested records would be provided, he did not unlawfully deny access to the record requested in the Complainant's November 6, 2007 OPRA request Item No. 1 because such records do not exist pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Complainant identified types of records in his November 6, 2007 and November 8, 2007 OPRA requests, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's requests are invalid under OPRA 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, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

4. The Custodian failed to respond in writing to the Complainant's November 6, 2007 OPRA request within the statutorily mandated seven (7) business days and violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records pursuant to Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Complainant's OPRA request items would require the Custodian to research his files and are therefore invalid under OPRA and the Custodian certified in the Statement of Information that no records responsive to the Complainant's November 6, 2007, OPRA request Item No. 1 exist. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by also failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records in the Complainant's November 8, 2007 OPRA request pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008); however, the Complainant's OPRA requests would require the Custodian to research his files and are therefore invalid under OPRA. 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 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