



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 27, 2007 Government Records Council Meeting

Michael D'Aquanni
Complainant

Complaint No. 2007-78

v.

Borough of Roselle
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian's failure to respond to the Complainant's OPRA requests in writing 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.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the Complainant's February 9, 2007 OPRA requests.
3. Because no records responsive exist to items No. 1 and No. 2 and the remaining request items do not list specific identifiable government records, it is concluded that the Custodian's failure to respond to the Complainant's February 9, 2007 OPRA requests does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she 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 27th Day of June 2007

David Fleisher, Secretary
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: July 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2007 Council Meeting**

**Michael A. D'Aquanni, Esq.¹
Complainant**

GRC Complaint No. 2007-78

v.

**Borough of Roselle (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all resolutions in relation to former Superintendent of Public Works Carl Bowles from January 1, 2007 to the present.
2. Any and all meeting minutes in relation to former Superintendent of Public Works Carl Bowles from January 1, 2007 to the present, whether executive, closed or open session.
3. Any and all resolutions in relation to former Superintendent of Public Works Carl Bowles during his tenure, 2002-2006.
4. Any and all meeting minutes in relation to former Superintendent of Public Works Carl Bowles during his tenure, 2002-2006, whether executive, open or closed session.

Request Made: February 9, 2007³

Response Made: None

Custodian: Rhona Bluestein

GRC Complaint Filed: March 13, 2007

Background

February 9, 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.

March 13, 2007

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

- Complainant's OPRA records request dated February 9, 2007 (with attachment)

¹ No representation listed on record.

² Custodian represented by Ira Karasick, Esq. (Montclair, NJ).

³ Complainant sent two separate requests via certified mail on February 9, 2007. Both requests were received and signed for on February 13, 2007.

- Complainant's second OPRA records request dated February 9, 2007 (with attachment)

The Complainant states that he sent two OPRA requests via certified mail on February 9, 2007. The Complainant further states that the Custodian acknowledged receipt of both requests on February 13, 2007. The Complainant asserts that he received no response to either OPRA request.

March 13, 2007

Offer of Mediation sent to both parties.

March 15, 2007

The Custodian agrees to participate in mediation.

March 20, 2007

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

March 21, 2007

Request for the Statement of Information sent to the Custodian.

March 27, 2007

Letter of No Defense from the GRC to the Custodian. The GRC states that the Custodian must submit a Statement of Information by close of business on April 2, 2007.

March 29, 2007

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

- Complainant's OPRA records request dated February 9, 2007
- Complainant's second OPRA records request dated February 9, 2007

The Custodian states that she received two OPRA requests⁴ via certified mail on February 13, 2007. The Custodian asserts that no records were responsive to request items No. 1 and No. 2. The Custodian further asserts that request items No. 3 and No. 4 do not clearly identify the documents sought. The Custodian further asserts that she is not legally required to perform research on documents in order to fulfill an OPRA request.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

⁴ Items No. 1 and No. 2 were contained in the Complainant's first OPRA request, while items No. 3 and No. 4 were contained in the Complainant's second OPRA request.

“...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. 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.

Pursuant to N.J.S.A. 47:1A-5.g, if the Custodian is unable to fulfill the OPRA request, the Custodian shall promptly return the request form with a written explanation as to why the records are unavailable. Also, pursuant to N.J.S.A. 47:1A-5.i, a Custodian’s failure to respond to a records request granting access, denying access, seeking clarification or requesting an extension of the statutory response time within the required seven (7) business days results in a “deemed” denial.

In this case, the Custodian completely failed to respond to the OPRA request resulting in a “deemed” denial under OPRA pursuant to N.J.S.A. 47:1A-5.i. The Custodian asserts that no records are responsive to OPRA request items No. 1 and No. 2 and asserts that OPRA request items No. 3 and No. 4 contain insufficient information to identify specific government records, therefore requiring research of the Custodian’s files. Notwithstanding the Custodian’s assertion that no records responsive exist to items No. 1 and No. 2, and that the remaining request does not list identifiable government records, the Custodian is obligated under N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. to reply to the OPRA request in writing within seven (7) business days of the receipt thereof. Because the Custodian failed to respond to the Complainant’s OPRA request within seven (7) business days, granting access, denying access, seeking clarification or requesting an extension of time, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.i.

The Custodian also asserts that OPRA requests items No. 3 and No. 4 do not provide sufficient information to enable the Custodian to ascertain the records requested. Included in the records requested are the words “any,” “all” and “in relation.” A Custodian is not required to do research to provide records, or “identify and siphon useful information” from all of the records made, maintained or kept on file by a public agency. Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (App. Div. 2005) and NJ Builders Association v NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007). Consistent with the Appellate Division’s decisions in Mag and NJ Builders, therefore, the Complainant’s OPRA request is unclear and overbroad.

The GRC has interpreted the required response provisions in OPRA to require that the Custodian seek clarification within seven (7) business days following receipt of the request if he or she determines that an OPRA request is overly broad or unclear. See Paff v. Bergen County Prosecutors Office, GRC Complaint No. 2005-115 (March 2006) and Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007). Because the Custodian failed to seek clarification of the Complainant’s OPRA request for items No. 3 and No. 4 in writing within the statutorily mandated seven (7) business days, such failure results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Custodian must also bear the burden of proving that a denial of access is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian has failed to provide any evidence that her failure to respond to the Complainant’s two February 9, 2007 OPRA requests was authorized by law. Therefore the Custodian has failed to bear her burden of proving that the “deemed” denial of access was authorized by law. N.J.S.A. 47:1A-6.

Whether the Custodian’s failure to respond to the records request 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.

The Complainant alleges that the Custodian never responded to his February 9, 2007 request. The Custodian certifies that no records were responsive for request items No. 1 and No. 2 and that request items No. 3 and No. 4 do not list identifiable government records.

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).

Because no records responsive exist to items No. 1 and No. 2 and the remaining request items do not list specific identifiable government records, it is concluded that the Custodian’s failure to respond to the Complainant’s February 9, 2007 OPRA requests does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since she 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. Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian's failure to respond to the Complainant's OPRA requests in writing 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.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the Complainant's February 9, 2007 OPRA requests.
3. Because no records responsive exist to items No. 1 and No. 2 and the remaining request items do not list specific identifiable government records, it is concluded that the Custodian's failure to respond to the Complainant's February 9, 2007 OPRA requests does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since she 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 20, 2007