



State of New Jersey
GOVERNMENT RECORDS COUNCIL

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER CHALRES RICHMAN
COMMISSIONER LUCILLE DAVY
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FINAL DECISION

September 26, 2007 Government Records Council Meeting

Joseph S. Oswald
Complainant

Complaint No. 2007-86

v.

Township of Hamilton, Health Department (Mercer)
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council (“Council”) considered the September 19, 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 while the Custodian disclosed the requested records to the Complainant pursuant to the Council’s July 25, 2007 Interim Order, the Custodian is in contempt of the Interim Order because the Custodian failed to provide access to the requested records within the five (5) business days ordered by the Council’s July 25, 2007 Interim Order. Given that the nature of contempt is not flagrant, no further action is required.

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 26th Day of September, 2007



Vincent P. Maltese, 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: October 3, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Joseph S. Oswald¹
Complainant**

GRC Complaint No. 2007-86

v.

**Township of Hamilton, Division of Health (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of investigation report conducted by Robert Decellis related to a noise complaint filed in April 2005.
2. Copy of neighborhood survey conducted by Robert Decellis and responses pertaining to the noise complaint filed in April 2005.

Request Made: August 30, 2006 and September 20, 2006

Responses Made: September 1, 2006 and September 28, 2006

Custodian: Jeffrey Plunkett, Township of Hamilton, Division of Health

GRC Complaint Filed: March 21, 2007

Background

July 25, 2007

Government Records Council's ("Council") Interim Order. At its July 25, 2007 public meeting, the Council considered the July 18, 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, found that:

1. Pursuant to N.J.S.A.47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Municipal Clerk's response to the Complainant's September 20, 2006 OPRA request was inadequate because it merely stated that the requested records had been previously provided.
2. Pursuant to N.J.S.A. 47:1A-6, the Municipal Clerk has not borne her burden of proving a lawful denial of access to the Complainant's September 20, 2006 OPRA request.
3. The Municipal Clerk shall disclose all records responsive to the Complainant's September 20, 2006 OPRA request.

¹ No representation listed on record.

² Represented by Paul Adezio, Esq. (Hamilton, NJ).

4. **The Municipal Clerk shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4 (2005)* to the Executive Director.**
5. The Municipal Clerk'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 Municipal Clerk's actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

July 26, 2007

Letter from the Custodian to the GRC. The Custodian certifies that the record requested in item No. 2 of the Complainant's August 30, 2006 and September 20, 2006 OPRA requests does not exist. The Custodian certifies that the neighborhood survey was conducted verbally by Mr. Robert Decellis and that no written report was created of this survey.³

July 30, 2007

Council's Interim Order distributed to the parties.

August 7, 2007

Municipal Clerk's response to the Council's Interim Order. The Municipal Clerk certifies that all records responsive were released to the Complainant and that no other records responsive to the Complainant's September 20, 2006 OPRA request exist.

Analysis

Whether the Custodian complied with the Council's July 25, 2007 Interim Order?

The Custodian certifies that all records responsive to the Complainant's September 20, 2006 OPRA request were released and that no other records exist. However, the Custodian released the records to the Complainant on August 7, 2007, or six (6) business days following receipt of the Council's Interim Order.

Pursuant to the Council's July 25, 2007 Interim Order, the Custodian had the duty to disclose the records requested in the Complainant's September 20, 2006 OPRA request even though the Custodian had previously provided the same records to the Complainant pursuant to the August 30, 2006 OPRA request.⁴ The Custodian complied with the Council's Interim Order to release the requested records to the Complainant, but failed to do so within five (5) days from the receipt of the order. Therefore, the Custodian has not complied with the Council's July 25, 2007 Interim Order because the Custodian failed to

³ The Custodian states that the neighborhood survey is conducted to assess the sentiment of other neighbors in the area of noise complaints. The Custodian also states that these surveys are performed regularly when a noise complaint is made.

⁴ See Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq. (January 2006).

provide access to the requested records within the time period required by the Council's July 25, 2007 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that while the Custodian disclosed the requested records to the Complainant pursuant to the Council's July 25, 2007 Interim Order, the Custodian is in contempt of the Interim Order because the Custodian failed to provide access to the requested records within the five (5) business days ordered by the Council's July 25, 2007 Interim Order. Given that the nature of contempt is not flagrant, no further action is required.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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VINCENT P. MALTESE, Chairman
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INTERIM ORDER

July 25, 2007 Government Records Council Meeting

Joseph Oswald
Complainant

Complaint No. 2007-86

v.

Township of Hamilton (Mercer)
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council ("Council") considered the July 18, 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:

1. Pursuant to N.J.S.A.47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Municipal Clerk's response to the Complainant's September 20, 2006 OPRA request was inadequate because it merely stated that the requested records had been previously provided.
2. Pursuant to N.J.S.A. 47:1A-6, the Municipal Clerk has not borne her burden of proving a lawful denial of access to the Complainant's September 20, 2006 OPRA request.
3. The Municipal Clerk shall disclose all records responsive to the Complainant's September 20, 2006 OPRA request.
4. **The Municipal Clerk shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4 (2005)* to the Executive Director.**
5. The Municipal Clerk'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 Municipal Clerk's actions appear to be negligent



and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2007

Vincent P. Maltese, 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 30, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

**Joseph S. Oswald¹
Complainant**

GRC Complaint No. 2007-86

v.

**Township of Hamilton, Division of Health (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of investigation report conducted by Robert Decellis related to a noise complaint filed in April 2005.
2. Copy of neighborhood survey conducted by Robert Decellis and responses pertaining to the noise complaint filed in April 2005.

Request Made: August 30, 2006 and September 20, 2006

Respons Made: September 1, 2006 and September 28, 2006

Custodian: Jeffrey Plunkett, Township of Hamilton, Division of Health

GRC Complaint Filed: March 21, 2007

Background

August 30, 2006

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.

September 1, 2006

Custodian's response to the first OPRA request. The Custodian responds to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that the noise complaint investigation was handled by Mercer County pursuant to the County Environmental Health Act. The Custodian states that the investigation report is enclosed.

September 20, 2006

Complainant's second OPRA request (identical to the first request). The Complainant requests the records relevant to this complaint on an official OPRA request form with attachments.

September 28, 2006

¹ No representation listed on record.

² Represented by Paul Adezio, Esq. (Hamilton, NJ).

Memo from the Custodian to the Municipal Clerk. The Custodian forwards the OPRA request to the Municipal Clerk and advises that all records on file pertaining to the Complainant's request have been previously provided to the Complainant. The Custodian further advises the Municipal Clerk that if the Complainant would like to come and inspect the records, he should call to make arrangements to do so.

September 28, 2006

Municipal Clerk's response to the Complainant's second OPRA request.³ The Municipal Clerk responds to this request on the seventh (7th) business day following receipt of the request. The Municipal Clerk states that all responsive records were previously provided to the Complainant on September 1, 2006 and that the records are open for inspection.

March 21, 2007

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

- Complainant's OPRA request dated August 30, 2006.
- Letter from the Custodian to the Complainant dated September 1, 2006.
- Complainant's second OPRA request with attachments dated September 20, 2006.
- Letter from the Custodian to the Municipal Clerk dated September 28, 2006.
- Letter from the Municipal Clerk to the Complainant dated September 28, 2006.

The Complainant states that he submitted an OPRA request to the Custodian on August 30, 2006. The Complainant states that the Custodian responded to him in writing on the second (2nd) business day following the receipt of the request. The Complainant states that the records which the Custodian provided were not responsive to the August 30, 2006 request.

The Complainant states that he submitted an identical OPRA request to the Custodian on September 20, 2006. The Complainant states that the Municipal Clerk responded to this request on the seventh (7th) business day following the Custodian's receipt of the request. The Complainant states that the Municipal Clerk advised the Complainant that he had already been provided with the requested records, but that the file is always open for inspection if the Complainant wished to do so.

March 30, 2007

Offer of Mediation sent to both parties.

April 4, 2007

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

April 9, 2007

³ The Municipal Clerk responded to Complainant's OPRA request dated September 20, 2006 which is identical to the August 30, 2006 OPRA request.

Request for the Statement of Information sent to the Custodian.

April 12, 2007

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

April 12, 2007

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until April 20, 2007 to file the Statement of Information.

April 20, 2007

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

- Complainant's OPRA request dated August 30, 2006.
- Letter from the Custodian to the Complainant dated September 1, 2006 (with attachments).
- Complainant's second OPRA request with attachments dated September 20, 2006.
- Letter from the Custodian to the Municipal Clerk dated September 28, 2006.
- Letter from the Municipal Clerk to the Complainant dated September 28, 2006.

The Custodian states that he received the Complainant's August 30, 2006 request and responded on the second (2nd) business day following receipt of the request. The Custodian states that all records responsive to this request were enclosed with the response. The Custodian also states that he informed the Complainant that all noise complaints were now handled by Mercer County pursuant to the County Environmental Health Act.

The Custodian states that he received an identical OPRA request from the Complainant on September 20, 2006. The Custodian asserts that he forwarded the request to the Municipal Clerk with a note stating that the records responsive to this request were previously provided to the Complainant. The Custodian states that the Municipal Clerk responded to the Complainant seven (7) business days following the receipt of the request and advised the Complainant that all records responsive to this request were previously provided and that the file is always available for inspection.

May 10, 2007

Letter from the Complainant to the GRC. The Complainant states that he has examined the Custodian's SOI and attachments. The Complainant contends that the document index is inadequate because the Complainant has not received the requested records. The Complainant further asserts that the Health Officer promised to provide the requested records to him.

Analysis

Whether the Municipal Clerk 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 therefore 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 therefore ...” 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.

The question arises as to whether or not the Municipal Clerk can lawfully deny access to records that were previously provided to the Complainant. The GRC has previously ruled that a custodian has a duty to answer each individual request as separate and unique, regardless of whether or not the records requested have previously been provided. In Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211 et seq.

(January 2006),⁴ the Custodian responded to the Complainant's OPRA requests by stating that all records had been previously provided to the Complainant. The GRC ruled that the Custodian had violated N.J.S.A. 47:1A-6 by not establishing a lawful basis to deny access to the Complainant's requests.

In this complaint, although the Municipal Clerk's response was timely, the Municipal Clerk simply advised the Complainant in the response that all records had previously been provided. The Municipal Clerk's response is therefore insufficient under N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Municipal Clerk did not grant access, deny access, seek clarification or request an extension of the statutorily mandated response time. See also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007); Caggiano, supra. Therefore, the Municipal Clerk violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Municipal Clerk, therefore, did not bear her burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether the Municipal Clerk's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive

⁴ Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252. Joseph S. Oswald v. Township of Hamilton, Health Department (Mercer), 2007-86 – Findings and Recommendations of the Executive Director

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 Complainant made an OPRA request on September 20, 2006 which was identical to an OPRA request he made on August 30, 2006. The Custodian forwarded Complainant's September 20, 2006 OPRA request to the Municipal Clerk on September 28, 2006. The Municipal Clerk responded to the Complainant on the same day, which was within the statutorily-mandated seven (7) business days required; however, she failed to provide a lawful basis for a denial of access. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., see Kelley v. Rockaway Township, *supra*, Caggiano v. Borough of Stanhope, *supra*. The Municipal Clerk's failure to provide a legally sufficient response, however, appears to be negligent rather than intentional or willful. Therefore, it does not appear that the actions of the Municipal Clerk rose to the level of a knowing and willful violation.

Based on the foregoing, it is concluded that the Municipal Clerk'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 Municipal Clerk's actions appear to be 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 Municipal Clerk's response to the Complainant's September 20, 2006 OPRA request was inadequate because it merely stated that the requested records had been previously provided.
2. Pursuant to N.J.S.A. 47:1A-6, the Municipal Clerk has not borne her burden of proving a lawful denial of access to the Complainant's September 20, 2006 OPRA request.
3. The Municipal Clerk shall disclose all records responsive to the Complainant's September 20, 2006 OPRA request.
4. **The Municipal Clerk shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4 (2005)* to the Executive Director.**
5. The Municipal Clerk'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 Municipal Clerk's actions appear to be 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

July 18, 2007