



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

Scott T. Jenkins
Complainant

Complaint No. 2008-139

v.

Borough of Island Heights (Ocean)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 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 failure to respond in writing to the 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).
2. Requests for records made to the Judiciary Branch of New Jersey State government are not within the Council’s authority to adjudicate. N.J.S.A. 47:1A-7. See Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April 2008). Because the records requested in Items No. 1 and No. 2 were made, maintained and kept on file by the Municipal Court, the Custodian should have provided a written response to the Complainant’s OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.
3. The Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
4. Because request Item No. 3 of the Complainant’s OPRA request is not a request for identifiable government records, the request is invalid and the



Custodian would not have 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) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) had she responded in writing in a timely manner.

5. Even though the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the Custodian certified that no records responsive to the Complainant's June 3, 2008 OPRA request exist and request Item No. 3 is invalid because no identifiable government record is requested. 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 "deemed" denial and insufficient response 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 25th Day of February, 2009

Robin Berg Tabakin, Chair
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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Scott T. Jenkins¹
Complainant**

GRC Complaint No. 2008-139

v.

**Borough of Island Heights (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all adjudicated Title 39 motor vehicle summonses issued by the Borough of Island Heights Police Department (“IHPD”) in all adjacent boroughs, townships, municipalities and cities from 2007 to present.
2. Any and all adjudicated Title 39 Motor Vehicle summonses issued by the Island Heights Police Department within the Borough of Island Heights from 2007 to present.
3. All statistical data in reference to motor vehicle summonses issued from 2007 to present including individual officer statistical records.

Request Made: June 3, 2008

Response Made: None

Custodian: Ellie Rogalski

GRC Complaint Filed: July 7, 2008³

Background

June 3, 2008

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.

July 7, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated June 3, 2008.

The Complainant states that he submitted an OPRA request to the Custodian via facsimile on June 3, 2008. The Complainant states that he received no response from the Custodian regarding this request.

The Complainant did not agree to mediate this complaint.

¹ No legal representation listed on record.

² Represented by Steven A. Zabarsky, Esq. (Toms River, NJ).

³ The GRC received the Denial of Access Complaint on said date.

July 21, 2008

Request for the Statement of Information sent to the Custodian.

July 25, 2008

Letter from the Custodian's Counsel to the GRC. Counsel requests an extension until August 1, 2008 to submit the Statement of Information.

July 25, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until August 1, 2008 to submit the Statement of Information.

August 1, 2008

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

- Complainant's OPRA request dated June 3, 2008 with Custodian's notes thereon.
- Call Log 08-8493 dated June 6, 2008.
- Call Log 08-8494 dated June 6, 2008.
- *New Jersey Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records* dated November 4, 2005.

The Custodian certifies that her search for the requested records involved forwarding the Complainant's June 3, 2008 OPRA request to the IHPD after receipt of the request on June 5, 2008.

Custodian states that the Complainant requested an OPRA request form on June 3, 2008. The Custodian states that she provided the Complainant with a request form. The completed form was received by the Custodian on June 5, 2008. The Custodian states that she forwarded the request to the IHPD. The Custodian asserts that Officer Burns of the IHPD advised the Borough of Island Heights Court ("Municipal Court") Administrator, Beth Boettger ("Ms. Boettger"), of the Complainant's request. The Custodian asserts that Ms. Boettger advised that the Borough Attorney should be contacted. The Custodian asserts that after Officer Burns contacted the Borough Attorney to inform him that no records responsive to the Complainant's OPRA request exist, the Borough Attorney advised Officer Burns to forward the request to the Chief Financial Officer ("CFO").

The Custodian asserts that she contacted the Complainant via telephone to inform him that no such records exist. The Custodian asserts that she spoke with the Complainant on one (1) occasion and followed up with two (2) voice mail messages on July 8, 2008 and July 10, 2008.

The Custodian's Counsel contends that the requested records are not government records pursuant to N.J.S.A. 47:1A-1.1. Counsel contends that the Borough of Island Heights does not maintain or keep on file any adjudicated summonses of the Municipal Court or officers' statistical records. Further, the Custodian's Counsel contends that some of the terms used by the Complainant in his request are vague and non-specific. The Custodian's Counsel states that the Borough is the Executive Branch of government

and has no jurisdiction or authority over the Municipal Court or its records. The Custodian's Counsel states that OPRA does not apply to the Judiciary and cites to Rule 1:38 of the Rules Governing the Courts of the State of New Jersey and Directive No. 15-05 of the Administrative Office of the Courts of the State of New Jersey.

The Custodian's Counsel contends that any adjudicated summonses which occurred in Municipal Court would come under the sole jurisdiction of the Judiciary, for which Directive No. 15-05 governs records requests. The Custodian's Counsel requests that this Denial of Access Complaint be dismissed for the foregoing reasons.

August 5, 2008

The Complainant's response to the Custodian's SOI. The Complainant states that he hand delivered his June 3, 2008 OPRA request to the Custodian on June 5, 2008. The Complainant asserts that he tried to contact the Custodian on July 7, 2008 to inquire about the status of his request. The Complainant asserts that the Custodian informed him that the request had been disseminated to the appropriate department heads.

The Complainant contends that he never received a voice mail message from the Custodian on July 8, 2008 or July 10, 2008 and points out that the alleged voice mail messages were left just after the Complainant filed this Denial of Access Complaint. Further, the Complainant disagrees with the Custodian Counsel's assertion that the Custodian contacted the Complainant to advise him that no records responsive to the Complainant's June 3, 2008 OPRA request existed.

The Complainant asserts that the Custodian has violated OPRA by failing to respond within seven (7) business days from receipt of the Complainant's June 3, 2008 OPRA request. The Complainant asserts that the Custodian did not request an extension of the statutorily mandated time frame to respond, nor did the Custodian provide a written denial of access.

August 5, 2008

Letter from the Custodian's Counsel to the GRC attaching a Verizon long distance billing record.

The Custodian's Counsel states that the redacted telephone bill is evidence that the Custodian made two (2) telephone calls to the Complainant on July 8, 2008 and July 10, 2008. The Custodian's Counsel states that the Custodian called the contact number provided by the Complainant on the OPRA request form on those dates.

August 11, 2008

E-mail from the Complainant to the GRC. The Complainant states that he is in receipt of Counsel's letter dated August 5, 2008. The Complainant asserts that the contact number highlighted on the telephone bill is one (1) digit off from the contact number provided by the Complainant. The Complainant asserts that this is proof that the Custodian failed to leave two (2) voice mail messages for the Complainant on July 8, 2008 and July 10, 2008.

Finally, the Complainant asserts that the Custodian failed to perform her duties by failing to send a written response or return the Complainant's OPRA request form with the Custodian's reason for denial of access to the requested records.

December 3, 2008

E-mail from the GRC to the Custodian. The GRC states that while inspecting the evidence of record, it noticed that the copy of the Complainant's OPRA request form provided with the SOI contains an annotation that six (6) pages of records at a cost of \$4.50 were available for disclosure. The GRC requests that the Custodian certify to the following:

1. Whether the six (6) pages of records annotated on the Complainant's June 3, 2008 OPRA request were provided to the Complainant?
2. To what item number of the Complainant's June 3, 2008 OPRA request were these records in response?
3. Whether any other records responsive to the Complainant's June 3, 2008 OPRA request exist?

The GRC requests that the Custodian provide this certification by no later than close of business on December 8, 2008.

December 5, 2008

Certification from the Custodian to the GRC with the following attachments:

- Complainant's OPRA request dated June 3, 2008 with Custodian's notes thereon.
- Call Log 08-8491 dated June 6, 2008.
- Call Log 08-8492 dated June 6, 2008.
- Call Log 08-8493 dated June 6, 2008.
- Call Log 08-8494 dated June 6, 2008.
- Letter from Officer Burns to the CFO dated June 6, 2008.
- "Understanding the New Open Public Records Law" by Valerie Brown, Esq.⁴

The Custodian certifies that the six (6) pages of records were not provided to the Complainant because they were not responsive to the Complainant's request. The Custodian certifies that the six (6) pages of records are records that traced the events that occurred as a result of the Custodian's inquiry regarding this request.

The Custodian certifies that based on the information provided by the IHPD, it is clear that the municipality does not maintain the records requested by the Complainant. The Custodian certifies that it is the position of Ms. Boettger, the Municipal Court Administrator, that OPRA does not apply to the Judicial Branch of government.

The Custodian further certifies that she did make two attempts to contact the Complainant via telephone despite the Complainant's contention that she dialed the wrong number. The Complainant contends that the OPRA request form showed a contact number different from the contact number the Complainant now provides to the GRC.

⁴ No date is provided for this article.

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 provides that:

“[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record.*” (Emphasis added.) N.J.S.A. 47:1A-5.h.

OPRA also states 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 also provides that:

“[t]he council *shall not have jurisdiction* over the *Judicial* or Legislative Branches of State Government or any agency, officer, or employee of those branches.” (Emphasis added.) N.J.S.A. 47:1A-7.g.

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 this complaint, the Complainant asserts the Custodian failed to perform her duty by not providing a written response to the Complainant’s June 3, 2008 OPRA request. Conversely, the Custodian asserts she verbally advised the Complainant that no records responsive exist and attempted to contact the Complainant via telephone on July 8, 2008 and July 10, 2008.

Therefore, the Custodian’s failure to respond in writing to the 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).

Additionally, the Custodian’s Counsel argues that the requested records are held exclusively at the Municipal Court. Further, the Custodian’s Counsel argues that OPRA does not apply to the Judicial Branch. Requests for records made to the Judiciary Branch of New Jersey State Government are not within the Council’s authority to adjudicate. N.J.S.A. 47:1A-7. See Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April 2008). Because the records requested in Items No. 1 and No. 2 were made, maintained and kept on file by the Municipal Court, the Custodian should have provided a written response to the Complainant’s OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.

Further, the Custodian certifies that the municipality does not retain any records responsive to this request. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that there was no unlawful denial of access to the requested records because the Custodian certified that no records responsive existed.

While the Custodian in this complaint failed to respond in writing to the Complainant's OPRA request, the Custodian did subsequently certify that no records exist which are responsive to the request relevant to this complaint. Therefore, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*, had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.

Moreover, request Item No. 3 is for statistical data regarding motor vehicle summonses and individual officer statistics. 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)⁵, the Superior Court references MAG, *supra*, 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."⁶

Therefore, because request Item No. 3 of the Complainant's OPRA request is not a request for identifiable government records, the request is invalid and the Custodian would not have unlawfully denied access to the requested records pursuant to MAG, *supra*, NJ Builders, *supra*, and Bent, *supra*, had she responded in writing in a timely manner.

Finally, the Custodian certifies that she made two (2) attempts to contact the Complainant via telephone on July 8, 2008 and July 10, 2008 and provides a redacted long distance telephone bill as evidence. The Complainant contends that the telephone number the Custodian dialed is one (1) digit off from the contact number the Complainant provided on the OPRA request form. In reviewing the Complainant's

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent.

OPRA request form, it is difficult to discern the confusion in the Complainant's contact telephone number. However, had the Custodian responded to the Complainant's June 3, 2008 OPRA request in writing within the statutorily mandated seven (7) business days required either stating that no records responsive existed for request Items No. 1 and No. 2 and that request Item No. 3 is invalid because no identifiable government record is requested, then this issue would have been moot.

Whether the Custodian's deemed denial 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 (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).

Even though the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a deemed denial, the Custodian certified that no records responsive to the Complainant's June 3, 2008 OPRA request exist and request Item No. 3 is invalid because no identifiable government record is requested. 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 deemed denial and insufficient response 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. The Custodian's failure to respond in writing to the 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).
2. Requests for records made to the Judiciary Branch of New Jersey State government are not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7. See Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April 2008). Because the records requested in Items No. 1 and No. 2 were made, maintained and kept on file by the Municipal Court, the Custodian should have provided a written response to the Complainant's OPRA request stating that she possessed no records responsive to this request. See N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i.
3. The Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
4. Because request Item No. 3 of the Complainant's OPRA request is not a request for identifiable government records, the request is invalid and the Custodian would not have 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) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) had she responded in writing in a timely manner.
5. Even though the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the Custodian certified that no records responsive to the Complainant's June 3, 2008 OPRA request exist and request Item No. 3 is invalid because no identifiable government record is requested. 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 "deemed" denial and insufficient response 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

February 18, 2009