



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Rebecca Ashton
Complainant

Complaint No. 2008-159

v.

Maurice River Township (Cumberland)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 14, 2009 Supplemental 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 because the Custodian has established in his motion for reconsideration of the Council’s November 4, 2009 decision and Findings and Recommendations that it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is granted and the Council’s November 4, 2009 Findings and Recommendations are modified to indicate that the Custodian responded timely and in writing to the Complainant’s June 26, 2008 requests. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 22nd Day of December, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Rebecca Ashton¹
Complainant**

GRC Complaint No. 2008-159

v.

**Maurice River Township (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

First OPRA request dated June 26, 2008:³

1. Copies of any written document that has allowed Jack Lafferty, i.e. Jack's Garage in Port Elizabeth, New Jersey, to be exempt from the same laws, policies and regulation regarding the operations of any business on his property with regard to housing school buses, repairs of same, maintenance on township vehicles including but not limited to the OEM (Original Equipment Manufacturer) truck. What excludes him from the same regulation that this township has applied to Wm. Ashton Transport?
2. Records as described in item no. 1 above regarding the housing of crab pots and fishing equipment on the Robinson property without permits.
3. Records as described in item no. 1 above regarding Elliott's Sewage, Dave Bowen and Martin Rafine. The lot and block numbers for the properties of the above listed people are on a prior request made to the Custodian.

Second OPRA request dated June 26, 2008:

Date of purchase, purchase price, mileage at time of purchase, and who performs the maintenance on the Gator.

Request Made: June 26, 2008

Response Made: July 2, 2008

Custodian: Gordon Gross⁴

GRC Complaint Filed: July 23, 2008⁵

¹ No legal representation listed on record.

² Represented by Edward F. Duffy, Esq. (Vineland, NJ).

³ The Complainant submitted two (2) OPRA requests on the same day. Although both OPRA request forms were dated June 26, 2008, the first (1st) request form included an attachment dated June 24, 2008 detailing the records sought. For identification purposes only, this OPRA request shall be referred to as the first OPRA request.

⁴ The Township Clerk has provided the GRC with Maurice River Township Resolution No. 40-2008 wherein Gordon Gross is named as the Deputy Custodian for the Construction Office

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

Background

November 4, 2009

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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 first 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 first June 26, 2008 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. Because the Complainant failed to specify identifiable government records sought in either of the requests, both of the requests are invalid 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested in either of the June 26, 2008 requests.
3. Although the Custodian’s failure to provide a written response to the Complainant’s first request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, 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 because the Complainant’s requests were invalid, inasmuch as they failed to specify identifiable government records. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

November 9, 2009

Council’s Findings and Recommendations distributed to the parties.

November 18, 2009⁶

Custodian’s request for reconsideration of the Council’s November 4, 2009 Findings and Recommendations. The Custodian asserts that the Council made a mistake and should reconsider its decision of November 4, 2009.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
Rebecca Ashton v. Maurice River Township (Cumberland), 2008-159 – Supplemental Findings and Recommendations of the Executive Director

The Custodian contends that pursuant to paragraphs one (1) and (3) of the Council's Interim Order, the deemed denial attributed to the Custodian was based upon the absence of a written response to the Complainant's first OPRA request within the statutorily mandated seven (7) business days. The Custodian asserts that the first written response of the Township Clerk, which was included in the Statement of Information provided to the GRC, specifically referenced "Gator information." The Custodian also asserts that the Township Clerk authorized a second letter to the Complainant on July 3, 2008 stating that the records were available for pickup and quoting the cost of such records. The Custodian acknowledges that this second letter from the Custodian was not copied to the Construction Office and therefore was not included in the SOI. The Custodian contends that the Complainant nevertheless received the letter that the Construction Official had supplied the records to the Clerk's Office on July 2, 2008 and, per the Clerk's instructions within the statutorily mandated seven (7) business days. The Custodian also submits a copy of the July 3, 2008 letter. The Custodian contends that he provided two written responses dated July 2, 2008 and July 3, 2008, respectively, regarding the Complainant's two requests and that the Complainant received both of these responses within the statutorily-mandated seven (7) business day time period.

Analysis

Whether the Custodian has met the required standard for reconsideration of the Council's November 4, 2009 Findings and Recommendations?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television*

System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Custodian asserts that a mistake requires the Council's reconsideration of its November 4, 2009 decision. Specifically, the Custodian contends that the GRC was mistaken in its finding that the Custodian failed to respond to the Complainant's first OPRA request dated June 26, 2008. The Custodian contends that the first written response of the Township Clerk, which was included in the Statement of Information provided to the GRC, specifically referenced "Gator information" and that a second letter to the Complainant stating that the records were available for pickup and quoting the cost of such records was sent on July 3, 2008. The Custodian acknowledges that this second letter from the Custodian was not copied to the Construction Office and therefore was not included in the SOI.

The Custodian's submissions to the Council in support of his Request for Reconsideration indicate that the Custodian did, in fact, respond to both the Complainant's requests in writing within the statutorily-mandated seven (7) business day time frame. Although the Custodian inadvertently failed to include the July 3, 2008 letter which indicated that all records requested were available for pick-up, and thus, said evidence was not before the Council at the time of its November 4, 2009 adjudication of this matter, the Custodian has submitted such evidence in support of this Request for Reconsideration.

As the moving party, the Custodian is required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian has met his burden of proving that the GRC did not consider the significance of probative, competent evidence that the Custodian did timely respond to the Complainant's two OPRA requests dated June 26, 2008.

Therefore, because the Custodian has established in his motion for reconsideration of the Council's November 4, 2009 decision and Findings and Recommendations that it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Therefore, the Council's November 4, 2009 Findings and Recommendations are modified to indicate that the Custodian responded timely and in writing to the Complainant's June 26, 2008 requests.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has established in his motion for reconsideration of the Council's November 4, 2009 decision and Findings and Recommendations that it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is granted and the Council's November 4, 2009 Findings and Recommendations are modified to indicate that the Custodian responded timely and in writing to the Complainant's June 26, 2008 requests. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
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CHARLES A. RICHMAN
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FINAL DECISION

November 4, 2009 Government Records Council Meeting

Rebecca Ashton
Complainant

Complaint No. 2008-159

v.

Maurice River Township (Cumberland)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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 first 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 first June 26, 2008 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. Because the Complainant failed to specify identifiable government records sought in either of the requests, both of the requests are invalid 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested in either of the June 26, 2008 requests.
3. Although the Custodian’s failure to provide a written response to the Complainant’s first request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, 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 because the Complainant’s requests were invalid, inasmuch as they failed to specify identifiable government



records. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Rebecca Ashton¹
Complainant**

GRC Complaint No. 2008-159

v.

**Maurice River Township (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

First OPRA request dated June 26, 2008:³

1. Copies of any written document that has allowed Jack Lafferty, i.e. Jack's Garage in Port Elizabeth, New Jersey, to be exempt from the same laws, policies and regulation regarding the operations of any business on his property with regard to housing school buses, repairs of same, maintenance on township vehicles including but not limited to the OEM (Original Equipment Manufacturer) truck. What excludes him from the same regulation that this township has applied to Wm. Ashton Transport?
2. Records as described in item no. 1 above regarding the housing of crab pots and fishing equipment on the Robinson property without permits.
3. Records as described in item no. 1 above regarding Elliott's Sewage, Dave Bowen and Martin Rafine. The lot and block numbers for the properties of the above listed people are on a prior request made to the Custodian.

Second OPRA request dated June 26, 2008:

Date of purchase, purchase price, mileage at time of purchase, and who performs the maintenance on the Gator.

Request Made: June 26, 2008

Response Made: July 2, 2008

Custodian: Gordon Gross⁴

GRC Complaint Filed: July 23, 2008⁵

¹ No legal representation listed on record.

² Represented by Edward F. Duffy, Esq. (Vineland, NJ).

³ The Complainant submitted two (2) OPRA requests on the same day. Although both OPRA request forms were dated June 26, 2008, the first (1st) request form included an attachment dated June 24, 2008 detailing the records sought. For identification purposes only, this OPRA request shall be referred to as the first OPRA request.

⁴ The Township Clerk has provided the GRC with Maurice River Township Resolution No. 40-2008 wherein Gordon Gross is named as the Deputy Custodian for the Construction Office

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

Background

June 26, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on two (2) official OPRA request forms.

June 30, 2008

Interoffice memorandum from the Township Clerk to the Custodian. The Township Clerk forwards the Complainant's OPRA requests to the Custodian and requests that the Custodian provide the records requested in both records requests by July 3, 2008.

July 2, 2008

Interoffice memorandum from the Custodian to the Township Clerk attaching the following:

1. Zoning Officer's Notes to File dated June 28, 2008;
2. Letter to Bernice Robinson dated June 30, 2008 regarding Outdoor Storage Violations;
3. Letter to Mr. & Mrs. Gary Elliott dated July 2, 2008 regarding Elliott's Septic Service.

The Custodian states that he is attaching all correspondence sent to the property owners on the list attached to the Complainant's current request or on a prior request. The Custodian notes that Sharon⁶ supplied the hour meter readings for the OEM Gator (13.7hrs.)

July 2, 2008

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's second OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that the Gator information requested by the Complainant is ready. The Custodian states that copying fees for the responsive records amount to \$3.00.⁷

July 9, 2008

Letter from the Complainant to the Township Clerk. The Complainant states that although she has received the records requested for Elliott's Sewage and Dave Bowen, she has not received the records requested for Jack Lafferty. The Complainant states that the Custodian is in violation of OPRA.

⁶ A Maurice River Township employee.

⁷The Custodian did not provide the GRC with a separate response to the first OPRA request. However, both the Complainant and the Custodian state that the Complainant picked up records responsive to both requests on July 9, 2009.

July 17, 2008

Letter from the Complainant to the Township Clerk. The Complainant states that she just completed a Denial of Access Complaint regarding the Custodian's failure to respond to the Complainant's OPRA requests. The Complainant states that it has been 15 days since the Complainant submitted her requests. The Complainant states that the Custodian should be aware of his obligation to respond to the Complainant's OPRA requests.

July 23, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁸

- Complainant's OPRA requests dated June 26, 2008;
- Letter from the Custodian to the Complainant dated July 2, 2008;
- Letter from the Complainant to the Township Clerk dated July 14, 2008;
- Letter from the Township Clerk to the Complainant dated July 18, 2008.

The Complainant states that Maurice River Township ("Township") has a policy of selective enforcement of the various regulations governing the operation of a business in the Pineland Zone. The Complainant also states that Jack Lafferty of Jack's Garage is allowed to operate a large automotive business without permits in a Pinelands Zone. The Complainant states that despite the illegal status of the business, the Township continues to do business with this entity. The Complainant further states that the Township's policy of selective enforcement has cost her son thousands of dollars in legal fees. The Complainant states that the Custodian unlawfully denied her access to the records requested.

July 28, 2008

Letter from the Township Clerk to the GRC. The Township Clerk states that he believes the Complainant's dispute is over records that are in the custody of Mr. Gordon Gross, who is the Construction Officer, the Housing/Zoning Officer, and the OEM Officer for Maurice River Township. The Township Clerk states that he has no direct access to the records in question. The Township Clerk requests that the GRC name Gordon Gross the Custodian for this complaint because he was appointed as a Deputy Custodian of the Records in Maurice River Township by Resolution #40-2008 dated February 21, 2008.

November 7, 2008

Offer of Mediation sent to both parties.

November 12, 2008

The Complainant does not agree to mediation.

December 1, 2008

The Custodian agrees to mediate this complaint.

⁸ The Complainant included additional material that was not relevant to the adjudication of this complaint. Rebecca Ashton v. Maurice River Township (Cumberland), 2008-159 – Findings and Recommendations of the Executive Director

December 9, 2008

Request for the Statement of Information (“SOP”) sent to the Custodian.

December 31, 2008

Custodian’s SOI with the following attachments:⁹

- Complainant’s OPRA requests dated June 26, 2008;
- Interoffice memorandum from the Township Clerk to the Custodian dated June 30, 2008;
- Letter from the Custodian to the Complainant dated July 2, 2008;
- Interoffice memorandum from the Custodian to the Township Clerk dated July 2, 2008;
- Two (2) receipts for copy fees paid on July 9, 2008 for both OPRA requests.

The Custodian certifies that Maurice River Township has attempted to respond to the Complainant’s requests in good faith. The Custodian certifies that he made the records requested available to the Complainant on July 2, 2008. The Custodian further certifies that the Complainant picked up the requested records responsive to both OPRA requests on July 9, 2008. The Custodian certifies that in some instances, the Complainant’s request demands to know why a document does not exist. The Custodian certifies that an explanation as to why a document does not exist is not a proper OPRA request but a matter to be taken up with the Township Committee. The Custodian certifies that under the totality of circumstances, he has not knowingly or willfully violated OPRA

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

⁹ The Custodian included additional material that was not relevant to the adjudication of this complaint. Rebecca Ashton v. Maurice River Township (Cumberland), 2008-159 – Findings and Recommendations of the Executive Director

“[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. 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.

The GRC first turns to the issue of whether the Custodian responded to the Complainant’s requests in a timely manner. The Custodian responded to the Complainant’s second OPRA request on the fourth (4th) business day, stating that the Gator information the Complainant requested was ready. There is no evidence that the Custodian responded in writing to the Complainant’s first OPRA request.

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.¹⁰ 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

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

“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).

Therefore, the Custodian’s failure to respond in writing to the Complainant’s first 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 first June 26, 2008 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).

Nevertheless, the Complainant’s requests are not valid 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),¹¹ 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.”¹²

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...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

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).”

Neither the first nor the second of the Complainant’s OPRA requests identified the specific government records sought. The first OPRA request sought “any written document” regarding a specified subject matter. A “document” is not an identifiable government record but is rather a generic term that encompasses a diverse class of records. OPRA does not countenance open-ended searches of an agency’s files. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005). The Complainant’s second request sought the “[d]ate of purchase, purchase price, mileage at time of purchase, and who performs the maintenance” on a piece of Township equipment: this request therefore seeks information rather than a specific identifiable government record.

Therefore, because the Complainant failed to specify identifiable government records sought in either of the requests, both of these requests are invalid 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested in either of the June 26, 2008 requests.

Because the Complainant’s requests are invalid under OPRA, further inquiry into the sufficiency of the Custodian’s response is moot.

Whether the Custodian’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, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian's failure to provide a written response to the Complainant's first request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, 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 because the Complainant's requests were invalid, inasmuch as they failed to specify identifiable government records. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's first 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 first June 26, 2008 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. Because the Complainant failed to specify identifiable government records sought in either of the requests, both of the requests are invalid 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested in either of the June 26, 2008 requests.
3. Although the Custodian's failure to provide a written response to the Complainant's first request within the statutorily mandated seven (7) business

days resulted in a “deemed” denial, 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 because the Complainant’s requests were invalid, inasmuch as they failed to specify identifiable government records. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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October 21, 2009