



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

November 4, 2009 Government Records Council Meeting

Barbara Kulig
Complainant

Complaint No. 2008-263

v.

Cumberland County Board of Freeholders
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. Although the Custodian responded in writing to the Complainant’s October 18, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Complainant’s OPRA request is overly broad because it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, and is thus invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian’s failure to respond in writing to each request item individually within the statutorily mandated seven (7) business days resulted in a violation of N.J.S.A. 47:1A-5.g., because the Complainant’s OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, 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 insufficient response 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**

**Barbara Kulig¹
Complainant**

GRC Complaint No. 2008-263

v.

**Cumberland County Board of Freeholders²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all information, records and knowledge regarding the current economic and development state and any information, records and knowledge regarding pending actions regarding Block 76, Lot 5 in the Deerfield Township Redevelopment Zone, Deerfield Township, Cumberland County, New Jersey. Specifically, all information, records and knowledge regarding the current economic and development state and pending actions regarding Deerfield Township Redevelopment Zone encompassing Block 76 Lots No. 1 through No. 5 and No. 31 through No. 33 since June 1, 2008.
2. All information, records and knowledge in regard to the document presented by Freeholder Director Louis N. Magazzu (“Mr. Magazzu”) on September 23, 2008 for the Cumberland County Plan for the Future 2010 through 2020 or the presentation known by any another name shown at the September 23, 2008 meeting and the website address or the actual published record.

Request Made: October 18, 2008

Response Made: October 28, 2008

Custodian: Kenneth Mecouch

GRC Complaint Filed: November 28, 2008³

Background

October 18, 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.

¹ No legal representation listed on record.

² Represented by Gary D. Wodlinger, Esq. (Vineland, NJ).

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

October 28, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian certifies that the Complainant's OPRA request was received by his office on October 22, 2008. The Custodian certifies that he forwarded the request to the Department of Planning and Economic Development Office, who provided the "2010-2020 The Future is Now" meeting minutes dated September 23, 2008. The Custodian certifies that he left a message on the Complainant's answering machine stating that the copy cost for the record is \$7.50.⁴

October 28, 2008

Letter from the Complainant to the Custodian. The Complainant states that enclosed is a money order in the amount of \$7.50 for payment of ten (10) pages of records in response to the Complainant's OPRA request.⁵

November 28, 2008

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

- Complainant's OPRA request dated October 18, 2008.
- County of Cumberland Public Records Response form dated October 28, 2008 with the Complainant's notes thereon.
- Legal certification of the Custodian dated October 28, 2008.
- "2010-2020 The Future is Now – Environmental Focus Group" meeting minutes dated September 23, 2008.

The Complainant states that she submitted an OPRA request to the Cumberland County Board of Freeholders on October 18, 2008. The Complainant states that the Custodian provided access to ten (10) pages of records on October 28, 2008 upon receipt of payment of copying costs of \$7.50.

The Complainant contends that the Custodian failed to address whether any records responsive to request Item No. 1 exist.

Further, the Complainant contends that the Custodian failed to provide the document presented by Mr. Magazzu at a September 23, 2008 meeting or website for the County Plans for the Future 2010-2020. The Complainant contends that the September 23, 2008 meeting was posted on the Cumberland County News website as a presentation, not a focus group; therefore, meeting minutes from the meeting is an unacceptable response to the Complainant's request Item No. 2.⁶

⁴The Custodian certifies in the Statement of Information that the meeting minutes were sent to the Complainant upon receipt of the Complainant's payment of \$7.50 on October 30, 2008.

⁵The Complainant does not identify for which request item the records are being provided.

⁶The Complainant indicates in the Denial of Access Complaint that she inquired about the presentation several times prior to the September 23, 2008 meeting and was informed by Ms. Kimberly Woods, staff member of the Cumberland County Department of Planning and Economic Development, that no document or website existed.

The Complainant does not agree to mediate this complaint.

January 12, 2009

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

January 15, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 18, 2008.
- County of Cumberland Public Records Response form dated October 28, 2008 with the Complainant’s notes thereon.
- Legal certification of the Custodian dated October 28, 2008.
- “2010-2020 The Future is Now – Environmental Focus Group” meeting minutes dated September 23, 2008.

The Custodian certifies that his search for the requested records involved forwarding the Complainant’s OPRA request to the Department of Planning and Economic Development Office, which provided the “2010-2020 The Future is Now” meeting minutes dated September 23, 2008 to the Custodian for disclosure.

The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that he received the Complainant’s OPRA request on October 22, 2008. The Custodian certifies that he left a message on the Complainant’s answering machine on October 28, 2008 stating that meeting minutes are available at a copying cost of \$7.50. The Custodian certifies that he mailed the meeting minutes to the Complainant upon receipt of payment on October 30, 2008.

Additionally, the Custodian certifies that the Complainant was also sent a memorandum from Ms. Kimberly Woods, staff member of the Cumberland County Department of Planning and Economic Development, stating that no separate website exists for the “2010-2020 The Future is Now” project⁷ and an Affidavit from the Custodian in response to the Complainant’s OPRA request on October 30, 2008.⁸

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

⁷ There is no evidence of record to support the Custodian’s claim that a memorandum was sent to the Complainant.

⁸ 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.

“...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 states that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefor ...” N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ... failure to respond shall be deemed a denial of the request ... The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (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.

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 specifically states that a custodian “shall promptly comply with *a request...* [for] *a government record.*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.”

Based on OPRA and the GRC’s holding in Paff, *supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within seven (7) business days after receipt of such request.

In this complaint, Counsel responded on October 28, 2008 providing access to the “2010-2020 The Future is Now” meeting minutes dated September 23, 2008 at a copying cost of \$7.50. However, the Custodian’s initial response failed to identify whether any records responsive to request Item No. 1 existed.

Therefore, based on the evidence of record, although the Custodian responded in writing to the Complainant’s October 18, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

However, the Complainant’s request sought “any and all information, records and knowledge” regarding pending actions regarding several lots on Block 76 in Deerfield Township’s redevelopment zone since June 1, 2008 and “all information, records and knowledge” regarding a document presentation by Mr. Magazzu on September 23, 2008. The Complainant’s request did not identify specific government records sought but instead set forth the subject matter of the records sought.

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 (March 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 (October 2005)⁷, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify

with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” 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 [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The Complainant in this matter failed to identify the specific government records sought. The Complainant’s OPRA request for “any and all information, records and knowledge” relating to several lots on Block 76 in Deerfield Township’s redevelopment zone and “all information, records and knowledge” regarding a document presented by Mr. Magazzu on September 23, 2008 would have required the Custodian to search all of his records to identify those responsive to the Complainant’s requests. The Complainant’s request is overly broad under OPRA and thus the request is invalid.

Therefore, the Complainant’s OPRA request is overly broad because it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, and is thus invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian’s insufficient response 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 respond in writing to each request item individually within the statutorily mandated seven (7) business days resulted in a violation of N.J.S.A. 47:1A-5.g., because the Complainant’s OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, 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 insufficient response 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. Although the Custodian responded in writing to the Complainant’s October 18, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. The Complainant's OPRA request is overly broad because it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, and is thus invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. Although the Custodian's failure to respond in writing to each request item individually within the statutorily mandated seven (7) business days resulted in a violation of N.J.S.A. 47:1A-5.g., because the Complainant's OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, 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 insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009