



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

August 11, 2009 Government Records Council Meeting

Arthur F. Carlomagno
Complainant

Complaint No. 2008-32

v.

Borough of Northvale (Bergen)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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 majority of the audio recording for the requested meeting does not exist, the Custodian certified that a recording of the last few minutes of said meeting does exist. The Custodian should have provided the Complainant access to the portion of the audio recording that does exist, however incomplete. As such, the Custodian has not borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the audio recording of the Council’s January 10, 2007 meeting. However, the Council declines to order disclosure of said recording because the Custodian provided same to the Complainant in response to his second OPRA request.
2. Although the Custodian provided the Complainant with an audio recording in response to his request, the Complainant’s OPRA request dated August 9, 2007 does not identify with reasonable clarity a specific government record. As such said request is 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), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on 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 unlawfully denied access to the portion of the audio recording of the Council’s January 10, 2007 meeting that does exist, the Custodian made additional records available to the Complainant even though she is not required to do so under OPRA. 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 unlawful denial of access to the portion of the audio recording of the Council's January 10, 2007 meeting that does exist 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 11th Day of August, 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
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Arthur F. Carlomagno¹
Complainant**

GRC Complaint No. 2008-32

v.

**Borough of Northvale (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

- OPRA Request dated January 16, 2007: Audio recording of the Borough Council's meeting dated January 10, 2007³
- OPRA Request dated August 9, 2007: Comments made by former Mayor John Rooney during the January 10, 2007 Council meeting regarding the incident at 492 Tappan Road.

Request Made: January 16, 2007 and August 9, 2007

Response Made: January 18, 2007 and August 10, 2007

Custodian: Wanda A. Worner

GRC Complaint Filed: January 24, 2008⁴

Background

January 16, 2007

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 18, 2007

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the requested record is denied because the computer did not record the meeting.

¹ No legal representation listed on record.

² Represented by Thomas Randall, Esq., of Randall & Randall (Westwood, NJ).

³ The Complainant originally requested the written minutes of said meeting but verbally amended his request on January 16, 2007 to seek the audio recording of said meeting.

⁴ The GRC received the Denial of Access Complaint on said date.

March 7, 2007

Letter from Custodian to Complainant regarding the Complainant's first OPRA request. The Custodian states that the computer did not record the meeting because the Borough was unaware that the hard drive was out of memory.

August 9, 2007

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 10, 2007

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian provides a CD-ROM containing a portion of the Council's January 10, 2007 meeting.⁵

January 24, 2008

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

- Complainant's OPRA request dated January 16, 2007 (including the Custodian's response)
- Letter from Custodian to Complainant dated March 7, 2007⁶

The Complainant states that he submitted his OPRA requests on January 16, 2007 and August 9, 2007. The Complainant states that he seeks access to the audio recording of the Borough Council's January 10, 2007 meeting. The Complainant states that the Custodian denied access to his first request on the basis that the meeting did not record. However, the Complainant states that in response to his second OPRA request, the Custodian provided a partial recording of the meeting.

The Complainant did not agree to mediate this complaint.

February 26, 2008

Request for the Statement of Information sent to the Custodian.

February 29, 2008

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

- Complainant's OPRA request dated January 16, 2007 (including the Custodian's response)
- Letter from Custodian to Complainant dated March 7, 2007
- Complainant's OPRA request dated August 9, 2007⁷

⁵ Only the last few minutes of the meeting recorded; the remainder of the meeting did not record on the Borough's computer.

⁶ The Complainant attached additional records; however, said records are not relevant to the adjudication of this Denial of Access Complaint.

⁷ The Custodian attached additional records; however, said records are not relevant to the adjudication of this Denial of Access Complaint.

The Custodian certifies that she received the Complainant's first OPRA request on January 16, 2007 in which the Complainant sought access to the written minutes of the Council's January 10, 2007 meeting. The Custodian certifies that she informed the Complainant on said date that she had not yet prepared the written minutes, and the Complainant verbally amended his request to seek the audio recording of said meeting. The Custodian certifies that on January 18, 2007, she discovered that the entire meeting did not record. The Custodian certifies that the Complainant's request is for the portion of the meeting which began at 8:00 PM, which did not record. The Custodian made a notation on the Complainant's OPRA request form that the computer did not record and returned the form to the Complainant on January 18, 2007. The Custodian also certifies that on March 7, 2007, at the request of the Complainant, she provided the Complainant with a letter indicating that the computer did not record the meeting dated January 10, 2007 because the computer ran out of hard drive space.

Additionally, the Custodian certifies that she received the Complainant's second OPRA request on August 9, 2007. The Custodian certifies that she forgot that the January 10, 2007 meeting did not record and attempted to make a CD-ROM of the meeting. The Custodian certifies that the CD-ROM only contains the last few minutes of the meeting because the rest of the meeting did not record. The Custodian certifies that the CD-ROM provided to the Complainant in response to the August 9, 2007 OPRA request contains her test of the equipment in the afternoon of January 10, 2007 and the portion of the meeting which began after closed session, at approximately 10:35 PM. The Custodian provided the CD-ROM to the Complainant on August 10, 2007.

Further, the Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), the requested minutes are to be maintained permanently.

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 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.

Complainant’s OPRA Request Dated January 16, 2007

The Custodian certified that she received the Complainant’s OPRA request on January 16, 2007. The Custodian also certified that on said date she informed the Complainant that she had not yet prepared the written minutes for the requested meeting, and the Complainant verbally amended his request to seek the audio recording of said meeting. The Custodian certified that on January 18, 2007 she discovered that the computer failed to record the requested meeting, with the exception of the last few minutes of said meeting beginning at 10:35 PM. The Custodian denied the Complainant access to the audio recording of said meeting on January 18, 2007 on the basis that the computer did not record the meeting.

Additionally, the Custodian certified that she completed the written minutes on February 1, 2007 and had the Deputy Clerk call the Complainant to advise that he could pick up a copy of the written minutes.

Therefore, although the majority of the audio recording for the requested meeting does not exist, the Custodian certified that a recording of the last few minutes of said meeting does exist. The Custodian should have provided the Complainant access to the portion of the audio recording that does exist, however incomplete. As such, the Custodian has not borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the audio recording of the Council’s January 10, 2007 meeting. However, the Council declines to order disclosure of said recording because the Custodian provided same to the Complainant in response to his second OPRA request.

Complainant’s OPRA Request Dated August 9, 2007

The Custodian certified that she received the Complainant’s OPRA request on August 9, 2007. The Custodian certified that she made a CD-ROM of what she thought was the meeting dated January 10, 2007 forgetting that the computer only recorded the last few minutes of the meeting. The Custodian provided the CD-ROM to the Complainant on August 10, 2007.

The specific wording of the Complainant's request is for comments made by former Mayor John Rooney at the January 10, 2007 Council meeting regarding the incident at 492 Tappan Road.

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),⁸ 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."⁹

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..."

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 # 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)."

In this instant complaint, the Complainant sought access to "comments." Comments are not identifiable government records. Comments could encompass a written statement, or an audio or video recording of said comments. As written, the Complainant's request for comments does not identify with reasonable clarity the records sought. The Complainant does not specifically request a recording of the Mayor's comments; he simply requests comments.

Therefore, although the Custodian provided the Complainant with an audio recording in response to his request, the Complainant's OPRA request dated August 9, 2007 does not identify with reasonable clarity a specific government record. As such

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

said request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

The Custodian certified that she denied the Complainant access to the requested audio recording of the Council’s January 10, 2007 meeting on the basis that the computer did not record said meeting. However, the Custodian also certified that the computer did record the last few minutes of said meeting. As such, the Custodian unlawfully denied access to the portion of the audio recording that does exist. However, the Custodian also made the written minutes available to the Complainant after she prepared them, even though she is not required to do so under OPRA. Further, the Custodian provided the Complainant access to the audio recording of the Council’s January 10, 2007 meeting in response to his second OPRA request, even though said request is invalid because it fails to identify a specific government record with reasonable clarity.

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 unlawfully denied access to the portion of the audio recording of the Council's January 10, 2007 meeting that does exist, the Custodian made additional records available to the Complainant even though she is not required to do so under OPRA. 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 unlawful denial of access to the portion of the audio recording of the Council's January 10, 2007 meeting that does exist 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. Although the majority of the audio recording for the requested meeting does not exist, the Custodian certified that a recording of the last few minutes of said meeting does exist. The Custodian should have provided the Complainant access to the portion of the audio recording that does exist, however incomplete. As such, the Custodian has not borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the audio recording of the Council's January 10, 2007 meeting. However, the Council declines to order disclosure of said recording because the Custodian provided same to the Complainant in response to his second OPRA request.
2. Although the Custodian provided the Complainant with an audio recording in response to his request, the Complainant's OPRA request dated August 9, 2007 does not identify with reasonable clarity a specific government record. As such said request is 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), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on 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 unlawfully denied access to the portion of the audio recording of the Council's January 10, 2007 meeting that does exist, the Custodian made additional records available to the Complainant even though she is not required to do so under OPRA. 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 unlawful denial of access to the portion of the audio recording of the Council's January 10, 2007 meeting that does exist appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009