



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

November 19, 2008 Government Records Council Meeting

David A. Walker
Complainant

Complaint No. 2008-44]

v.

NJ Department of Treasury,
Division of Purchase and Property
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 2008 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 has violated N.J.S.A. 47:1A-5.f. by failing to direct the Complainant to the NJ Department of Treasury’s official OPRA request form upon receipt of the Complainant’s January 30, 2008 letter specifically referencing OPRA pursuant to Barron v. Essex County Superintendent of Registration, GRC Complaint No. 2006-95 (April 2007), and Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (September 2007). *See also* Brewer v. New Jersey Department of Law & Public Safety, Division of New Jersey State Police, GRC Complaint No. 2006-204 (October 2007).
2. Although the Custodian failed to direct the Complainant to the NJ Department of Treasury’s official OPRA request form upon receipt of the Complainant’s January 30, 2008 letter referencing OPRA, the evidence of record shows that it was unclear to the Custodian as to whether the letter was intended as a request for records pursuant to OPRA and whether it should have been treated as an OPRA request. 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 by not directing the Complainant to the agency’s official OPRA request form 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 19th Day of November, 2008

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: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**David A. Walker¹
Complainant**

GRC Complaint No. 2008-44

v.

**New Jersey Department of Treasury,
Division of Purchase and Property²
Custodian of Records**

Records Relevant to Complaint: New Jersey Department of Transportation Reference No. T-1415, Bid Solicitation No. 08-X-39692:

1. Original Award Recommendation report dated October 19, 2007.
2. Memo dated December 27, 2007 that is referenced in the Supplemental Award Recommendation.

Request Made: January 30, 2008

Response Made: None

Custodian: Alice K. Small

GRC Complaint Filed: March 13, 2008

Background

January 30, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter that cites to OPRA.³

March 13, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated January 30, 2008.⁴

The Complainant states that he sent a letter to the Custodian on January 30, 2008, citing to OPRA and requesting that the Custodian fulfill a request made by the Complainant's client. The Complainant states that he received no response from the Custodian.

¹ No legal representation listed on record.

² Represented by DAG Cynthia Hackett, on behalf of the NJ Attorney General.

³ The letter submitted to the Custodian cites to OPRA in the first paragraph and then discusses previous non-OPRA requests for records submitted to the Custodian by the Complainant's client. The Complainant's January 30, 2008 letter request states that the Complainant's client was denied access to "two (2) government records which he is entitled to copies of pursuant to N.J.S.A. 47:1A-1."

⁴ The Complainant also attaches letters from his client to the Custodian requesting the records relevant to this complaint, but none of these letters cite to OPRA.

The Complainant did not agree to mediate this complaint.

May 6, 2008

Request for the Statement of Information sent to the Custodian.

May 13, 2008

E-mail from New Jersey Department of Treasury (“NJDOT”) OPRA Manager Barbara O’Hare to the GRC. Ms. O’Hare requests an extension of the deadline to submit the Statement of Information.

May 13, 2008

E-mail from the GRC to Ms. O’Hare. The GRC grants the Custodian an extension until May 20, 2008 to file the Statement of Information.

May 19, 2008

E-mail from Ms. O’Hare to the GRC. Ms. O’Hare requests another extension of time to submit the Statement of Information because the Custodian is away.

May 19, 2008

E-mail from the GRC to Ms. O’Hare. The GRC grants the Custodian an extension until May 22, 2008 to file the Statement of Information.

May 19, 2008

Letter from Ms. O’Hare to the GRC. Ms. O’Hare asserts that this complaint is not valid under OPRA because NJDOT never received an OPRA request from the Complainant on or about January 30, 2008 as stated in the Denial of Access Complaint. Ms. O’Hare alleges that even though the Complainant sent a letter to the Custodian on January 30, 2008, the letter was not considered a request for records pursuant to OPRA. Ms. O’Hare asserts that the Complainant was informed that in accordance with the GRC’s Advisory Opinion 2006-01, an OPRA request must be submitted on an agency’s official OPRA request form.

Ms. O’Hare states that the Complainant subsequently submitted an official OPRA request on April 7, 2008. Finally, Ms. O’Hare contends that this complaint and the supplementary documentation submitted to the GRC predates the Complainant’s actual OPRA request and that the GRC should dismiss this complaint.

May 21, 2008

Custodian’s Statement of Information (“SOI”) with no attachments.

The Custodian certifies that no OPRA request was ever received from the Complainant. The Custodian further contends that the supplementary documentation provided with the Complainant’s Denial of Access Complaint is not related to any OPRA request filed by the Complainant.

The Custodian states that OPRA grants the GRC the authority and obligation to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial

of access to a government record by a records custodian.” N.J.S.A. 47:1A-7. The Custodian contends that the GRC does not have jurisdiction over the complaint because the complaint filed does not concern a valid OPRA request. The Custodian states that the complaint does contain letters from the Complainant’s client to the NJDOT requesting certain documentation, but that none of this correspondence invokes OPRA.

The Custodian finally states that the GRC’s Advisory Opinion 2006-1 holds that in order for an OPRA request to be valid, the request must be submitted on an official form. The Custodian further states that an official OPRA request form is available at www.nj.gov/grc/register/ and at the NJDOT website at www.state.nj.us/treasury/administration/grau/index. The Custodian asserts that the Complainant in this matter did not use either the NJDOT OPRA request form or the GRC’s model request form and that this complaint should be dismissed.

July 7, 2008

Letter from the GRC to the Custodian. The GRC requests that the Custodian certify to the following:

1. Whether the Custodian or Ms. O’Hare responded in writing to the Complainant informing that an OPRA request must be submitted on the agency’s official request form?
2. If a written response to the Complainant stating that a request must be submitted on an official OPRA request form exists, please provide a copy of the response to the GRC.

July 10, 2008

E-mail from Ms. O’Hare to the GRC. Ms. O’Hare requests one (1) additional business day to submit the Custodian’s certification.

July 11, 2008

E-mail from the GRC to Ms. O’Hare. The GRC grants Ms. O’Hare’s request for a one (1) additional business day to submit the Custodian’s certification.

July 11, 2008

Custodian’s Certification attaching the following:

- Complainant Client’s Open Public Records Act (“OPRA”) letter request dated March 27, 2008.
- Letter from Ms. O’Hare to the Complainant’s client dated March 28, 2008.
- Letter from Ms. O’Hare to the GRC dated July 10, 2008.

The Custodian certifies that Ms. O’Hare’s July 10, 2008 letter to the GRC and supplementary documentation is a factual assessment of NJDOT’s response to the Complainant’s client directing him to NJDOT’s official OPRA request form.

July 16, 2008

E-mail from the GRC to the Custodian. The GRC states that the Custodian cannot certify to statements made by Ms. O'Hare. The GRC requests that Ms. O'Hare provide a certification in regards to statements made in her letter dated July 10, 2008.

July 16, 2008

Ms. O'Hare's Certification attaching the following:

- Complainant Client's Open Public Records Act ("OPRA") request in letter form dated March 27, 2008.
- Letter from Ms. O'Hare to the Complainant's client dated March 28, 2008.
- Letter from Ms. O'Hare to the GRC dated July 10, 2008.

Ms. O'Hare certifies that, in her May 19, 2008 letter to the GRC, she erred when she stated that the Complainant was advised that he would need to file an OPRA request on NJDOT's official OPRA request form. Ms. O'Hare certifies that the Complainant's client was notified of the requirement in a letter dated March 28, 2008, which responded to correspondence from the Complainant's client dated March 27, 2008 asserting that it was a request for public records under OPRA. Ms. O'Hare further certifies that the Division of Purchase and Property received official OPRA requests (numbered C35359 and C35364) from both the Complainant and the Complainant's client on April 7, 2008, seeking the records which are the subject of this complaint.

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 states that:

"[t]he custodian of a public agency shall *adopt a form* for the use of any person who requests access to a government record held or controlled by the public agency. The form *shall provide space for the name, address,*

and *phone number* of the requestor and a *brief description* of the *government record* sought. The form *shall include space* for the *custodian* to *indicate which record* will be *made available*, when the record will be *available*, and the *fees* to be *charged*.” (Emphasis added.) N.J.S.A. 47:1A-5.f.

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 Complainant asserts that he submitted a request for records by letter dated January 30, 2008. Conversely, the Custodian alleges that the Complainant’s letter was not a valid request for records pursuant to OPRA and that this complaint should be dismissed.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian “shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency.” N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that “each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If 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.* (Emphasis added.)
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing in § 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA’s central purpose of making government records “readily accessible” to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to

identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor's general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a "brief description" of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

The Complainant's January 30, 2008 OPRA request states that the Complainant's client was denied access to "two (2) government records which he is entitled to copies of pursuant to N.J.S.A. 47:1A-1." Additionally, the Complainant goes on to state that he is requesting these records. Therefore, the Complainant's January 30, 2008 letter should be considered an OPRA request because OPRA is explicitly implicated by the Complainant's reference to N.J.S.A. 47:1A-1 in his letter.

The Custodian relies on the GRC's Advisory Opinion 2006-1 to refute the Complainant's assertion that a denial of access occurred in this matter. Specifically, Advisory Opinion 2006-1 holds that based on the specific verbiage of the statute, all requestors must submit their "requests on an agency's official OPRA request form" or "the Model Request Form located on the [GRC] website." While the Custodian's reliance on Advisory Opinion 2006-1 is correct, the GRC previously decided two complaints requiring that a custodian direct a requestor to the agency's official OPRA request form when receiving a letter request. See Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (September 2007)(holding that custodians are required to direct requestors to the agency's official OPRA request form when denying a letter request on the basis that said request is not submitted on an official request form.) and Barron v. Essex County Superintendent of Registration, GRC Complaint No. 2006-95 (April 2007)(holding that the Custodian's staff member violated OPRA pursuant to N.J.S.A. 47:1A-5.f. by not providing the Complainant with the agency's official OPRA request form.) See also Brewer v. New Jersey Department of Law & Public Safety, Division of New Jersey State Police, GRC Complaint No. 2006-204 (October 2007).

In this complaint, the Custodian received the Complainant's January 30, 2008 letter which made specific reference to OPRA, but failed to respond in writing within the statutorily mandated seven (7) business day time frame directing the Complainant to NJDOT's official OPRA request form because it was unclear to the Custodian as to whether the letter was intended as a request for records pursuant to OPRA and whether it should have been treated as an OPRA request. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.f. by failing to direct the Complainant to NJDOT's official OPRA request form upon receipt of the Complainant's January 30, 2008 letter specifically referencing OPRA. pursuant to Barron, supra, and Spaulding, supra. See also Brewer, supra.

Whether the Custodian’s failure to direct the Complainant to NJDOT’s official OPRA request form 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).

Although the Custodian failed to direct the Complainant to NJDOT’s official OPRA request form upon receipt of the Complainant’s January 30, 2008 letter referencing OPRA, the evidence of record shows that it was unclear to the Custodian as to whether the letter was intended as a request for records pursuant to OPRA and whether it should have been treated as an OPRA request. 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 by not directing the Complainant to the agency’s official OPRA request form 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 has violated N.J.S.A. 47:1A-5.f. by failing to direct the Complainant to NJDOT's official OPRA request form upon receipt of the Complainant's January 30, 2008 letter specifically referencing OPRA pursuant to Barron v. Essex County Superintendent of Registration, GRC Complaint No. 2006-95 (April 2007), and Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (September 2007). *See also* Brewer v. New Jersey Department of Law & Public Safety, Division of New Jersey State Police, GRC Complaint No. 2006-204 (October 2007).

2. Although the Custodian failed to direct the Complainant to NJDOT's official OPRA request form upon receipt of the Complainant's January 30, 2008 letter referencing OPRA, the evidence of record shows that it was unclear to the Custodian as to whether the letter was intended as a request for records pursuant to OPRA and whether it should have been treated as an OPRA request. 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 by not directing the Complainant to the agency's official OPRA request form 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

November 13, 2008