



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

February 23, 2010 Government Records Council Meeting

John P. Schmidt
Complainant

Complaint No. 2009-119 and 2009-120

v.

City of Gloucester City (Camden)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 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 original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests 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’s request No. 1 would require the research of the original Custodian’s e-mail accounts over a two (2) year period to determine which e-mails pertain to business relating to Washington Township, and because a custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), and further, because request No. 2 seeks information rather than identifiable government records, the Complainant’s two (2) requests are invalid under OPRA and the original 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).



3. Although the original Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to respond to the GRC's request for the Statement of Information, because the Complainant's two (2) OPRA requests are invalid under OPRA, it is concluded that the original 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.

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 23rd Day of February, 2010

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: March 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**John P. Schmidt¹
Complainant**

GRC Complaint No. 2009-119 & 2009-120

v.

**City of Gloucester City (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. Inspection of all e-mails sent to or received from the Custodian's two (2) e-mail accounts pertaining to business relating to Washington Township (Burlington County) from January, 2007 to January, 2009.
2. Inspection of City of Gloucester City ("City") records to determine the work/leave status of the Custodian for 2008 including sick leave, personal leave, vacation leave, compensatory leave, leave without pay and family grievance leave. The records should include the date of leave and number of hours taken.³

Request Made: March 16, 2009

Response Made: None

Custodian: Kathleen M. Jentsch⁴

GRC Complaint Filed: April 16, 2009⁵

Background

March 16, 2009

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

March 16, 2009

E-mail from the Complainant to the original Custodian attaching the Complainant's two (2) OPRA requests. The Complainant requests that the original Custodian acknowledge receipt. The Complainant states that he previously e-mailed the two (2) attached OPRA requests to the original Custodian at a different e-mail address per the instructions set forth on the City's OPRA request form.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant notes that he is not requesting the Custodian's personnel file.

⁴ The original Custodian of Record is Paul J. Kain.

⁵ The GRC received the two (2) Denial of Access Complaints on said date.

March 25, 2009

E-mail from the Complainant to the original Custodian attaching the Complainant's two (2) OPRA requests. The Complainant states that he submitted the two (2) attached requests to the original Custodian via e-mail on March 16, 2009 and that the Clerk's Office advised that the original Custodian had received such. The Complainant states that the original Custodian advised on this date that he did not receive either request.⁶

The Complainant requests that the original Custodian acknowledge receipt of the two (2) OPRA requests.

April 16, 2009

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

- Complainant's first (1st) OPRA request dated March 16, 2009.
- Complainant's second (2nd) OPRA request dated March 16, 2009.
- E-mail from the Complainant to the Custodian dated March 16, 2009.
- E-mail from the Complainant to the Custodian dated March 25, 2009.

The Complainant states that he submitted his two (2) OPRA requests to the original Custodian on March 16, 2009 via the e-mail address identified on the City's official OPRA request form. The Complainant states that he re-submitted his requests on the same date after being informed that the original Custodian's e-mail address was different from the one shown on the City's official OPRA request form.

The Complainant states that on March 19, 2009, he spoke with an employee at the Clerk's Office who advised that the original Custodian had received the Complainant's two (2) requests. The Complainant states that he requested that the original Custodian acknowledge receipt by sending the Complainant an e-mail.

The Complainant states that the original Custodian subsequently contacted him on March 25, 2009 advising that the requests were never received.⁷ The Complainant states that he re-sent the two (2) OPRA requests via e-mail to the original Custodian on the same day and copied the City's administration.⁸

The Complainant states that, to date, the original Custodian has failed to respond to the Complainant's OPRA requests.

The Complainant agrees to mediate this complaint.

⁶ There is no evidence in the record that indicates whether the original Custodian's correspondence was verbal or written.

⁷ The Complainant indicates that the original Custodian contacted the Complainant regarding not receiving the Complainant's requests; however, there is no evidence to show that the original Custodian's correspondence was in writing.

⁸ The Complainant further stated that the Mayor and Council members confirmed receipt of said requests via telephone.

May 11, 2009

Offer of Mediation sent to the original Custodian. The original Custodian did not respond to the Offer of Mediation.

June 11, 2009

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

July 2, 2009

Letter from GRC to the original Custodian. The GRC sends a letter to the original Custodian indicating that the GRC provided the original Custodian with a request for a Statement of Information on June 11, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.⁹

Analysis

Whether the original 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:

“[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.

Further, 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

⁹ The Custodian did not respond to the GRC’s request for the SOI.
John P. Schmidt v. City of Gloucester City (Camden), 2009-119 & 2009-120 – Findings and Recommendations of the Executive Director

... 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.

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 “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Complainant submitted two (2) OPRA requests on March 16, 2009. The Complainant re-submitted his two (2) requests to the original Custodian on March 25, 2009. The Complainant asserted in the Denial of Access Complaint that the original Custodian contacted him on March 25, 2009 stating that he never received the Complainant’s requests. There is no evidence in the record showing that the original Custodian responded in writing to the Complainant.

Therefore, the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests pursuant

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.

to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Complainant's request No. 1 seeks all e-mails sent and received from the original Custodian's two (2) e-mail accounts pertaining to business relating to Washington Township, Burlington County from January, 2007 to January, 2009. The Complainant's request No. 2 seeks inspection of records that determine the work/leave status of the original Custodian for 2008. Although request Item No. 1 sought records pertaining to a specifically identified subject within a specified two (2) year period, said request would require the original Custodian to research all e-mails in order to find those responsive to the Complainant's request. Additionally, request Item No. 2 sought records that would have forced the original Custodian to research records to find and compile data regarding his leave status.

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, supra, 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 (March 2008), 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)."

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

¹² As stated in Bent, supra.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, *supra*, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato, *supra*, requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

“[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’¹³ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’¹⁴”

In the instant complaint, the Complainant's request No. 1 is a blanket request requiring the original Custodian to research two (2) years of e-mails in two (2) accounts in order to find those responsive to the Complainant's request. The Complainant's request No. 2 for records that may provide information as to the leave status of the original Custodian is a request for information not specific identifiable government records.

The Complainant's request No. 1 would require the research of the original Custodian's e-mail accounts over a two (2) year period to determine which e-mails pertain to business relating to Washington Township; a custodian is not required to conduct research in response to a request pursuant to Donato, *supra*. Further, request No. 2 seeks information rather than identifiable government records. Therefore, the Complainant's two (2) requests are invalid under OPRA and the original Custodian has not unlawfully denied access to the requested records pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

Whether the original Custodian's failure to respond to the Complainant's (2) OPRA requests 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.

¹³ “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

¹⁴ “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. John P. Schmidt v. City of Gloucester City (Camden), 2009-119 & 2009-120 – Findings and Recommendations of the Executive Director

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 original Custodian’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and the original Custodian failed to respond to the GRC’s request for the SOI, because the Complainant’s two (2) OPRA requests are invalid under OPRA, it is concluded that the original 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA requests 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’s request No. 1 would require the research of the original Custodian’s e-mail accounts over a two (2) year period to determine which e-mails pertain to business relating to Washington Township, and because a custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-

182 (February 2007), and further, because request No. 2 seeks information rather than identifiable government records, the Complainant's two (2) requests are invalid under OPRA and the original 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

3. Although the original Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to respond to the GRC's request for the Statement of Information, because the Complainant's two (2) OPRA requests are invalid under OPRA, it is concluded that the original 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010