



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Ricardo Gonzales
Complainant

Complaint No. 2009-121,
2009-122 & 2009-123

v.

Washington Township (Burlington)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that instant three (3) complaints should be dismissed because the Complainant has voluntarily withdrawn such in an e-mail to the GRC dated March 31, 2010.

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 28th Day of April, 2010

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: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Ricardo Gonzales¹
Complainant**

**GRC Complaint No. 2009-121,
2009-122 & 2009-123**

v.

**Washington Township (Burlington)²
Custodian of Records**

February 24, 2009 OPRA requests:

1. Inspection of minutes of all public meetings from January 1, 2007 to February 1, 2009, including regular session meetings, work session meetings, caucus meetings and special meetings.
2. Copy of a list of all executive session meetings from January 1, 2007 to February 1, 2009, including the following information:
 - Date of meeting.
 - Time of meeting.
 - Location of meeting.
 - Topics of meeting.

March 10, 2009 OPRA request:

1. Contact information for the Custodian, specifically: name, mailing address, daytime telephone number, fax number, and e-mail address.
2. Copy of any written policy covering the transfer of OPRA information via e-mail, including fee schedule if any applies.

Request Made: February 24, 2009 and March 10, 2009

Response Made: None.

Custodian: LaShawn Barber³

GRC Complaint Filed: April 16, 2009⁴

Background

January 26, 2010

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The original Custodian of Record is Paul J. Kain.

⁴ The GRC received the three (3) Denial of Access Complaints on said date.

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found 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 request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the original Custodian has failed to bear his burden of proving a lawful denial of access to the requested records. **The Custodian shall disclose the records requested in the Complainant's two (2) February 24, 2009 OPRA requests and the Complainant's March 10, 2009 OPRA request Item No. 2. If no records responsive to the requests exist, the Custodian must inform the Complainant and the Executive Director that no records responsive exist.**
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.**
4. Because the Complainant's request for the original Custodian's contact information seeks information rather than an identifiable government record, the Complainant's March 10, 2009 OPRA request Item No. 1 is invalid 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) and the original Custodian has not unlawfully denied access to requested information.
5. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

January 27, 2010

Council's Interim Order distributed to the parties.

February 4, 2010

E-mail from the Custodian to the Complainant. The Custodian acknowledges a conversation with the Complainant via telephone regarding the Complainant's OPRA requests. The Custodian requests additional time to locate files, if they exist. The

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Custodian states that she will keep the Complainant informed of any developments regarding these requests.⁶

February 15, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he will attempt to identify those records of critical importance which he wishes to review. The Complainant proposes a two (2) week extension of time, or until February 26, 2010, for the Custodian to respond to the Complainant's request to review the requested meeting minutes.⁷

The Complainant requests that the Custodian advise as to when and where he can inspect any records responsive. Additionally, the Complainant advises that the records could be provided electronically if they exist in that format, if this is more convenient to the Custodian.

February 15, 2010

E-mail from the Custodian to the Complainant. The Custodian advises that she will return to the Township office on February 16, 2010 and will be better able to ascertain the status of the Complainant's requests at that time. The Custodian acknowledges that she must respond to the Complainant's OPRA request by February 26, 2010.

February 22, 2010

E-mail from the Custodian to the Complainant. The Custodian confirms that the Complainant will review the Township's meeting minutes book on February 23, 2010 after 5:30 pm.

February 23, 2010

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian reschedule the appointment to review the meeting minutes book to March 2, 2010.⁸

February 23, 2010

E-mail from the Custodian to the GRC. The Custodian advises that the Complainant has agreed to reschedule his appointment to review the meeting minutes book to March 5, 2010.

March 10, 2010

E-mail from the GRC to the Custodian. The GRC states that, pursuant to the Custodian's e-mail dated February 23, 2010, the Complainant was scheduled to review records responsive to his three (3) OPRA requests on March 5, 2010. The GRC states

⁶ The Custodian also advises the Complainant that she has been hired as a part-time employee to assume the duties of a municipal clerk and address the immediate issue of cleaning up and organizing the Township's files. The Custodian includes updated contact information for the Township's offices.

⁷ The Complainant advises the Custodian that he is willing to consider his requests satisfied after reviewing the requested meeting minutes.

⁸ The Complainant initially suggests appearing to review records on March 2, 2010. The Custodian subsequently confirmed that this appointment was moved to March 5, 2010.

that pursuant to the Council's January 26, 2010 Interim Order, the Custodian was ordered to disclose the records responsive to the Complainant's OPRA requests and simultaneously provide certified confirmation of such within five (5) business days from receipt of the Council's Interim Order.

The GRC states that to date, it has not received a legal certification from the Custodian regarding her compliance with the Council's Interim Order. The GRC requests that the Custodian advise as to the status of the Township's compliance with the Council's Interim Order.

March 10, 2010

E-mail from the Complainant to the GRC. The Complainant states that he has met with the Custodian and feels that the Custodian is making an honest effort to satisfy the Complainant's OPRA requests. The Complainant advises that the Custodian has maintained an open line of communication with the Complainant.

March 16, 2010

E-mail from the Complainant to the GRC. The Complainant states that the Complainant went to the Township to review requested records on March 15, 2010. The Complainant states that the inspection was not very productive; however, the Complainant reiterates that the Custodian has continued to make an honest effort to provide all existing records responsive.

March 31, 2010

E-mail from the Complainant to the GRC. The Complainant states that the Complainant again went to the Township to review requested records on March 30, 2010. The Complainant reiterates his satisfaction with the Custodian's conduct. The Complainant states that he considers the OPRA requests at issue to be satisfied and withdraws the instant three (3) complaints.

Analysis

The Complainant voluntarily withdrew the instant (3) complaints in an e-mail to the GRC dated March 31, 2010; therefore, no analysis is needed.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the instant three (3) complaints should be dismissed because the Complainant has voluntarily withdrawn such in an e-mail to the GRC dated March 31, 2010.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

INTERIM ORDER

January 26, 2010 Government Records Council Meeting

Ricardo Gonzales
Complainant

Complaint Nos. 2009-121, 2009-122 & 2009-123

v.

Washington Township (Burlington)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council ("Council") considered the January 19, 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 request pursuant to N.J.S.A. 47:1A-5, g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the original Custodian has failed to bear his burden of proving a lawful denial of access to the requested records. **The Custodian shall disclose the records requested in the Complainant's two (2) February 24, 2009 OPRA requests and the Complainant's March 10, 2009 OPRA request Item No. 2. If no records responsive to the requests exist, the Custodian must inform the Complainant and the Executive Director that no records responsive exist.**
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
4. Because the Complainant's request for the original Custodian's contact information seeks information rather than an identifiable government record, the Complainant's March 10, 2009 OPRA request Item No. 1 is invalid pursuant to MAG Entertainment.

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



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) and the original Custodian has not unlawfully denied access to requested information.

5. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of January, 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: January 27, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**Ricardo Gonzales¹
Complainant**

GRC Complaint No. 2009-121, 2009-122 & 2009-123

v.

**Washington Township (Burlington)²
Custodian of Records**

Records Relevant to Complaint:

February 24, 2009 OPRA requests:

1. Inspection of minutes of all public meetings from January 1, 2007 to February 1, 2009, including regular session meetings, work session meetings, caucus meetings and special meetings.
2. Copy of a list of all executive session meetings from January 1, 2007 to February 1, 2009, including the following information:
 - Date of meeting.
 - Time of meeting.
 - Location of meeting.
 - Topics of meeting.

March 10, 2009 OPRA request:

1. Contact information for the Custodian, specifically: name, mailing address, daytime telephone number, fax number, and e-mail address.
2. Copy of any written policy covering the transfer of OPRA information via e-mail, including fee schedule if any applies.

Request Made: February 24, 2009 and March 10, 2009

Response Made: None.

Custodian: LaShawn Barber³

GRC Complaint Filed: April 16, 2009⁴

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The original Custodian of Record is Paul J. Kain.

⁴ The GRC received the three (3) Denial of Access Complaints on said date.

Background

February 24, 2009

Complainant's first (1st) and second (2nd) 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 10, 2009

Complainant's third (3rd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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 February 24, 2009.
- Complainant's second (2nd) OPRA request dated February 24, 2009.
- Complainant's third (3rd) OPRA request dated March 10, 2009.

The Complainant states that he submitted two (2) OPRA requests for public meeting minutes and a list of executive session meetings during a time period from January 1, 2007 to February 1, 2009 to the original Custodian on February 24, 2009. The Complainant asserts that he met with the original Custodian on March 10, 2009, at which time the original Custodian stated that he would provide records responsive to both requests on March 17, 2009. The Complainant states that he did not receive a response from the original Custodian.

The Complainant states that he submitted a third (3rd) OPRA request for the original Custodian's contact information and an e-mail policy and fee schedule, if any apply, to the original Custodian on March 10, 2009. The Complainant states that he did not receive a response from the original Custodian.

The Complainant agrees to mediate this complaint.

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.⁵

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 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 therefore.” (Emphasis added.) 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 ... 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.

⁵ The Custodian did not respond to the GRC’s request for the SOI.
Ricardo Gonzales v. Washington Township (Burlington), 2009-121, 2009-122, 2009-123 – Findings and Recommendations of the Executive Director

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.⁶ 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).

The original Custodian in the instant complaint failed to respond in writing to the Complainant’s three (3) OPRA requests.⁷

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 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).

Additionally, on February 24, 2009, the Complainant requested public session meeting minutes and a list of executive session meeting minutes (including date, time, location and topics discussed) for the time period January 1, 2007 through February 1, 2009. The Complainant also submitted a request on March 10, 2009 for the Township’s policy on providing records via e-mail and a fee schedule, if any applies. The original Custodian failed to respond to the Complainant’s request and failed to provide an SOI arguing why the requested records could not be provided.

Therefore, pursuant to N.J.S.A. 47:1A-6, the original Custodian has failed to bear his burden of proving a lawful denial of access to the requested records. The Custodian shall disclose the records requested in the Complainant’s two (2) February 24, 2009 OPRA requests and the Complainant’s March 10, 2009 OPRA request Item No. 2. If no

⁶ 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.

⁷ Additionally, there is no evidence of record to corroborate the Complainant’s assertion that he met with the Custodian on March 10, 2009.

records responsive to the requests exist, **the Custodian must inform the Complainant and the Executive Director that no records responsive exist.**

Moreover, 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

In the instant matter before the Council, the Complainant's request for "contact information of the original Custodian, specifically: name, mailing address, daytime telephone number, fax number, e-mail address" is a request for information and not a specific government record.

Therefore, because the Complainant's request for the original Custodian's contact information seeks information rather than an identifiable government record, the Complainant's March 10, 2009 OPRA request Item No. 1 is invalid pursuant to MAG, supra and Bent, supra and the original Custodian has not unlawfully denied access to requested information.

Whether the original Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

2. Pursuant to N.J.S.A. 47:1A-6, the original Custodian has failed to bear his burden of proving a lawful denial of access to the requested records. **The Custodian shall disclose the records requested in the Complainant's two (2) February 24, 2009 OPRA requests and the Complainant's March 10, 2009 OPRA request Item No. 2. If no records responsive to the requests exist, the Custodian must inform the Complainant and the Executive Director that no records responsive exist.**
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁸, to the Executive Director.**
4. Because the Complainant's request for the original Custodian's contact information seeks information rather than an identifiable government record, the Complainant's March 10, 2009 OPRA request Item No. 1 is invalid 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) and the original Custodian has not unlawfully denied access to requested information.
5. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
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