



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FINAL DECISION

January 26, 2010 Government Records Council Meeting

Steven Kossup
Complainant

Complaint No. 2009-134

v.

City of Newark (Essex)
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 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. Because the Custodian failed to address each item of the Complainant’s request, the Custodian has violated N.J.S.A. 47:1A-5.g. Paff v. Willingboro Board of Education (Burlington), GRC Complaint. No. 2007-272 (June 2008).
3. Because the second portion of the Complainant’s request does not identify the specific government record sought, the request is invalid 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), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied access to the records requested.
4. Although the Custodian’s unlawful deemed denial of access violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and although the Custodian provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the certified true copy of the requested minutes on the first (1st) business day following receipt of the certified true copy of the minutes, approximately twenty-five (25) business days following the date of receipt of the



Complainant's request, 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.

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 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 29, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Steven Kossup¹
Complainant**

GRC Complaint No. 2009-134

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: A certified true copy of the minutes from the Municipal Council Meeting held on March 5, 2002, wherein Bessie Walker made a motion regarding the unsafe conditions at 36 Victoria Street/Victoria Street Complex/the City Garages, along with certified true copies of any documents supporting Ms. Walker's motion.

Request Made: March 18, 2009

Response Made: May 4, 2009

Custodian: Joyce Lanier

GRC Complaint Filed: April 21, 2009³

Background

March 18, 2009

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

April 21, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated March 18, 2009. The Complainant agreed to mediate this complaint.

May 4, 2009

Custodian's response to the OPRA request attaching a certified true copy of the minutes for the Municipal Council meeting of March 5, 2002, which was dated May 1, 2009. The Custodian responds in writing to the Complainant's OPRA request on the twenty-fifth (25th) business day following receipt of such request.⁴ The Custodian states that access to the requested record is granted.

¹ No legal representation listed on record.

² Represented by Julien Neals, Esq. (Newark, NJ).

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

⁴ The Custodian certifies in the Statement of Information that he received the Complainant's request on March 27, 2009.

May 15, 2009

Offer of Mediation sent to both parties. The Custodian failed to respond to the Offer of Mediation.

June 3, 2009

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

June 8, 2009

Custodian’s SOI with the following attachments:

- Order of the Superior Court of New Jersey, Farina v. City of Newark et als., Docket No. ESX-L-2004-07, Law Division, Essex County, dated March 6, 2009;⁵
- Complainant’s OPRA request dated March 18, 2009;
- Letter from the Custodian to the Complainant dated May 4, 2009 (with attachments).

The Custodian certifies that she did not deny the Complainant’s OPRA request. The Custodian certifies that she forwarded the OPRA request to the appropriate departments within the City of Newark. The Custodian further certifies that upon receipt of the certified true copy of the minutes for the Municipal Council meeting of March 5, 2002, she mailed the minutes to the Complainant.

June 22, 2009

The Complainant’s response to the Custodian’s SOI. The Complainant states that it appears that the City of Newark is attempting to forego its obligation under OPRA by claiming the requested records are exempt from disclosure as a result of the protective order in another matter. The Complainant states that he did not make a records request in the matter of Farina v. City of Newark et als., nor did he make the OPRA request in the instant matter on behalf of a client. The Complainant states that the protective order in the matter of Farina v. City of Newark et als., prohibits discovery demands on the defendants in that action. The Complainant states that this is an OPRA request. The Complainant argues that the records requested are public records and therefore he is not bound by any protective order with respect to records requested under OPRA.

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:

⁵ Farina v. City of Newark, Docket No. ESX-L-2004-07. This order bars the Complainant from serving upon the City of Newark any demands for discovery, interrogatories, request for admissions, notice in lieu of subpoena, or any other discovery device without leave of the court.

“... 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.

OPRA further 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.

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 Custodian responded in writing to the Complainant’s OPRA request on the twenty-fifth (25th) business day following receipt thereof stating that access to the requested record was granted. The Custodian certified that upon receipt of the certified true copy of the minutes for the Municipal Council meeting of March 5, 2002, which was dated May 1, 2009, she mailed the minutes to the Complainant on the following business day, May 4, 2009.

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).

Therefore, the 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).

Furthermore, the Custodian's response is insufficient. In Paff v. Willingboro Board of Education (Burlington), GRC Complaint. No. 2007-272 (June 2008), the Council found that the custodian's response was legally insufficient and violated N.J.S.A. 47:1A-5.g., because he failed to respond to each request item individually.

The facts of the complaint currently before the Council are similar to those in Paff, supra. Like the custodian in Paff, the Custodian in the matter before the Council addressed some but not all of the Complainant's request items. The Custodian addressed the Complainant's request for meeting minutes but ignored the portion of the request that sought access to any documentation supporting Ms. Walker's motion.

Therefore, because the Custodian failed to address each item of the Complainant's request, the Custodian has violated N.J.S.A. 47:1A-5.g. Paff v. Willingboro Board of Education (Burlington), GRC Complaint. No. 2007-272 (June 2008).

Nevertheless, the portion of the Complainant's request for "any documentation supporting Ms. Walker's motion" is invalid because it fails to specifically identify the records sought. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (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.

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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The second portion of the Complainant’s request closely resembles the broad general request items invalidated in Schuler. The request items invalidated by the Council in Schuler sought access to “all documents related to the development or modification” for various property locations. The second portion of the Complainant’s request seeks access to “any documents supporting Ms. Walker’s motion.” OPRA only “operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.” MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The term “documents” does not identify a specific government record but rather, a class of records. Pursuant to Bent, *supra*, 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.

Therefore, because the second portion of the Complainant’s request does not identify a specific government record sought, the request is invalid 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), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

2009), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied access to the records requested.

Whether the 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?

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div.

Although the Custodian’s unlawful deemed denial of access violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and although the Custodian provided an insufficient response to the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with certified a true copy of the requested minutes on the first (1st) business day following receipt of the certified true copy of the minutes, approximately twenty-five (25) business days following the date of receipt of the Complainant’s request, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The 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. Because the Custodian failed to address each item of the Complainant's request, the Custodian has violated N.J.S.A. 47:1A-5.g. Paff v. Willingboro Board of Education (Burlington), GRC Complaint. No. 2007-272 (June 2008).
3. Because the second portion of the Complainant's request does not identify the specific government record sought, the request is invalid 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), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied access to the records requested.
4. Although the Custodian's unlawful deemed denial of access violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and although the Custodian provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the certified true copy of the requested minutes on the first (1st) business day following receipt of the certified true copy of the minutes, approximately twenty-five (25) business days following the date of receipt of the Complainant's request, 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.

Prepared By: Sherin Keys
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010