



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

Steven Kossup
Complainant

Complaint No. 2009-135

v.

City of Newark (Essex)
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 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 second (2nd) and third (3rd) portions of the Complainant’s request seek access to information and fail to identify a specific government record sought, these elements of the request are 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 Fenichel v. Cape May County Prosecutor’s Office, GRC Complaint No. 2009-72 (November 2009).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant’s OPRA request, because no records responsive to either portion of the Complainant’s request exist, and because the second (2nd) and third (3rd) portions of the request fail to identify a specific government record sought and are therefore invalid under OPRA, 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 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**

**Steven Kossup¹
Complainant**

GRC Complaint No. 2009-135

v.

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

Records Relevant to Complaint:

A certified true copy of any and all maintenance and construction bonds from 2001-2005 for 36 Victoria Street/Victoria Street Complex, specifically the contractors who maintained 36 Victoria Street/Victoria Street Complex from 2001-2005, and what maintenance, if any, was performed.

Request Made: March 18, 2009

Response Made: None

Custodian: Robert Marasco³

GRC Complaint Filed: April 20, 2009⁴

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 20, 2009

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

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.

¹ No legal representation listed on record.

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

³ Joyce Lanier, Manager of the City of Newark's OPRA Office, handled the Complainant's request in its entirety.

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

June 8, 2009

Custodian's SOI with the following attachments:

- Letter from OPRA Office Manager, Joyce Lanier to the Complainant dated February 5, 2008 (with 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; and
- Complainant's OPRA request dated March 18, 2009.

Ms. Lanier certifies that she received the Complainant's OPRA request on March 27, 2009 and did not respond. Ms. Lanier contends that by 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, the Complainant is barred from serving further demands for discovery on the City of Newark without leave of the court, which according to the Custodian's position extends to OPRA requests.

Ms. Lanier certifies that the Complainant previously filed a similar request that was the subject of GRC complaint Kossup v. City of Newark, GRC Complaint No. 2007-254 (October 2008) in which records were found and provided to the Complainant on February 5, 2008. Ms. Lanier certifies that when she forwarded the Complainant's OPRA request to the Engineering and Construction Departments, she was informed that no records responsive to the Complainant's OPRA request exist. Ms. Lanier further certifies that although she was able to provide the Complainant with similar responsive records on February 5, 2008, the agency no longer possesses any maintenance or construction records responsive to the Complainant's OPRA request.⁵

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 duty under OPRA by claiming that the requested records are exempt from disclosure as a result of a protective order in another matter. The Complainant states that he did not make any records request in the matter of Farina v. City of Newark et al., Docket No. ESX-L-2004-07, 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 argues that this is an OPRA request. The Complainant states that the records requested are public records and therefore he is not bound by the protective order with respect to records requested under OPRA.

July 2, 2009

Letter from Ms. Lanier to the Complainant. Ms. Lanier forwards a certification from Assistant Corporate Counsel Diego Navas dated February 11, 2009, which was prepared in accordance with the Order of the Superior Court of New Jersey dated January 9, 2009 in the matter of Farina v. City of Newark et als., Docket No. ESX-L-2004-07,

⁵ The Custodian does not indicate that these records were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

Law Division, Essex County, which required the City of Newark to produce all contractor information, work invoices, inspection reports and design specifications regarding the net installed at the 36 Victoria Street Garage.

Mr. Navas certifies that he requested that the City Clerk's Office conduct a search for contracts related to work done at the 36 Victoria Street Garage. Mr. Navas certifies that he was advised that the City Clerk's Office could not locate any records based on such a narrow criterion. Mr. Navas certifies that he was informed by the City Clerk that the City of Newark employs contractors to complete roofing and ceiling work without specifically indicating in the contract the location of the work (i.e. street address). Mr. Navas certifies that the City of Newark identified one contract with contractor Matthew and Company that was previously provided to the Complainant. Mr. Navas certifies that after consulting with the Finance Department and personally searching the archives, he was unable to locate any record of payment to Matthew and Company.

December 8, 2009

E-mail from the GRC to the Complainant. The GRC requests that the Complainant provide a certification indicating if he is in possession of any of the records disclosed pursuant to a previous OPRA request on February 5, 2008.⁶

December 8, 2009

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification indicating whether the Custodian maintained any records responsive to the Complainant's request at the time of the request.

December 14, 2009

Certification from Joyce Lanier. Ms. Lanier certifies that she forwarded the Complainant's request to the Engineering Department. Ms. Lanier further certifies that the Engineering Department is the department responsible for maintaining the records sought by the Complainant. Ms. Lanier also certifies that the Engineering Department conducted a search of their records and no records responsive to the Complainant's request were found.

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:

⁶ The Complainant did not respond to the GRC's e-mail.

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant’s records request seeks access to “any and all maintenance and construction bonds from 2001-2005 for 36 Victoria Street/Victoria Street Complex, and the contractors who maintained 36 Victoria Street/Victoria Street Complex from 2001-2005.” The Manager for the City of Newark’s OPRA Office certified that the City of Newark received the Complainant’s OPRA request on March 27, 2009 and did not respond to the request.

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.⁷ 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).

⁷ 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.

Although the Custodian failed to respond to the Complainant's record request, the OPRA Manager for the City of Newark has certified that no records responsive to either portion of the Complainant's request exist. The Complainant has submitted no evidence to refute these certifications.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the OPRA Office Manager for the City of Newark has certified that that no records responsive to the Complainant's request exist and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Furthermore, the second (2nd) and third (3rd) portions of the Complainant's request seek access to the names of contractors who maintained 36 Victoria Street/Victoria Street Complex from 2001-2005, as well as the maintenance they performed. This is a request for information rather than a specific identifiable government record and is therefore invalid under OPRA. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁹

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by

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

⁹ As stated in Bent, *supra*.

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).”

In Fenichel v. Cape May County Prosecutor’s Office, GRC Complaint No. 2009 – 72 (November 2009), the Complainant sought access to “information on the status of the criminal misconduct investigation”, “the anticipated date of completion” and the “review, summary, or conclusion of the criminal misconduct investigation.” The Council invalidated this request finding that the Complainant’s records request sought access to information and failed to identify the particular government record sought. MAG, Bent, and Schuler, supra.

Therefore, because the second (2nd) and third (3rd) portions of the Complainant’s request seek access to information and fail to identify a specific government record sought, these elements of the request are 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 Fenichel v. Cape May County Prosecutor’s Office, GRC Complaint No. 2009 – 72 (November 2009).

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. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant’s OPRA request, because no records responsive to either portion of the Complainant’s request exist, and the second (2nd) and third (3rd) portions of the request fail to identify a specific government record sought and are therefore invalid under OPRA, 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 second (2nd) and third (3rd) portions of the Complainant’s request seek access to information and fail to identify a specific government record sought, these elements of the request are 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 Fenichel v. Cape May County Prosecutor’s Office, GRC Complaint No. 2009-72 (November 2009).

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant's OPRA request, because no records responsive to either portion of the Complainant's request exist, and because the second (2nd) and third (3rd) portions of the request fail to identify a specific government record sought and are therefore invalid under OPRA, 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, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010