



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

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2009-163

v.

Borough of Fort Lee, Construction Office (Bergen)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 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 Complainant’s request does not identify with reasonable clarity the specific government records sought, said request is invalid under OPRA 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), 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 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 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 provide the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Complainant’s request is ultimately invalid under OPRA because it does not identify with reasonable clarity the specific government records sought.



Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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**

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

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2009-163

v.

**Borough of Fort Lee, Construction Office (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Review of records for Buckingham Towers Condominium in the Building Department (Construction Office).

Request Made: April 7, 2009

Response Made: April 27, 2009

Custodian: Neil Grant

GRC Complaint Filed: May 12, 2009³

Background

April 7, 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 27, 2009

Response to the Complainant's OPRA request from Ms. Judy Surace of the Construction Office. Ms. Surace responds in writing to the Complainant's OPRA request on the thirteenth (13th) business day following receipt of such request. Ms. Surace states that she searched for permits no. 89-103 and 89-560 regarding Josef Billig, 800 Palisade Avenue and has not located any permits responsive to the Complainant's request.

May 12, 2009

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

- Complainant's OPRA request dated April 7, 2009
- Response to the Complainant's OPRA request from Judy Surace of the Construction Office, dated April 27, 2009

¹ No legal representation listed on record.

² Represented by J. Sheldon Cohen, Esq., of DeCotiis, FitzPatrick, Cole & Wisler, LLP (Teaneck, NJ).

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

The Complainant states that he submitted his OPRA request on April 7, 2009 to review records for Buckingham Towers Condominium. The Complainant states that he spoke to Ms. Judy Surace on April 17, 2009 and clarified his OPRA request as seeking records for unit 22A in Buckingham Towers Condominium from 1988 through 1996 when the unit was owned by Josef and Ora Billig. The Complainant states that Ms. Surace notified him in writing on April 27, 2009 that she searched for permits no. 89-103 and 89-560 and could not locate any permits responsive.

The Complainant states that he never requested permits specifically, but rather requested a review of all records concerning the condominium unit 22A in Buckingham Towers from 1988 through 1996 when the unit was owned by Josef and Ora Billig. The Complainant states that he spoke to Ms. Surace again on May 7, 2009 who stated that the April 27, 2009 letter was the final determination regarding the Complainant's OPRA request. Additionally, the Complainant states that Ms. Surace indicated that the Complainant could not review the records because they are located in another building.

June 15, 2009

Offer of Mediation sent to both parties.

June 15, 2009

Custodian's signed Agreement to Mediate.

June 17, 2009

E-mail from GRC to Complainant. The GRC states that the Custodian agreed to mediate the Complainant's Denial of Access Complaint. The GRC asks the Complainant to return his signed Agreement to Mediate form if he, too, wishes to participate in mediation.⁴

July 22, 2009

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

July 27, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 7, 2009
- Response to the Complainant's OPRA request from Judy Surace of the Construction Office, dated April 27, 2009

The Custodian certifies that he received the Complainant's OPRA request on April 7, 2009 and forwarded it to the Building Department on said date. The Custodian certifies that he spoke to Ms. Judy Surace from the Building Department on April 17, 2009 who informed him that she would contact the Complainant because he sought all of the records in the Buckingham Towers Condominium, a multi-family high-rise building in the Borough. The Custodian certifies that Ms. Surace informed him that she spoke to the Complainant on April 17, 2009 and asked if he could narrow his request to specific records. The Custodian certifies that Ms. Surace informed him that the Complainant

⁴ The Complainant did not respond to the GRC's Offer of Mediation.

mentioned the name Josef Billig and unit 22A and she told the Complainant that she would search for permits with that name or unit number. The Custodian certifies that he never received any formal written amendment to the Complainant's OPRA request. The Custodian states that Ms. Surace provided the Complainant with a written response on April 27, 2009 indicating that she did not locate any records relating to Mr. Billig or unit 22A.

The Custodian states that Sharon Scheiner, Assistant Borough Clerk, attached a notation dated April 28, 2009 to the Complainant's OPRA request indicating that Ms. Surace received two (2) boxes from archives and had reviewed them and would notify the Complainant that said boxes were available for review, unaware that Ms. Surace had already responded to the Complainant's request.

Additionally, the Custodian certifies that no records responsive to the Complainant's request were located. The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, permit applications must be maintained for the life of the structure. The Custodian certifies that no records responsive have been destroyed, other than records damaged by Tropical Storm Floyd in 1999 due to flooding in the Municipal Building.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

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

OPRA states that:

"[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 also states:

“[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.

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.⁵ 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 this instant complaint, the Custodian certified that he received the Complainant’s OPRA request on April 7, 2009 and forwarded said request to the Building Department on said date for a response. The Complainant stated that he spoke to Ms. Judy Surace from the Building Department on April 17, 2009, the seventh (7th) business day following the Custodian’s receipt of his request, and verbally amended his OPRA request to seek records for unit 22A in Buckingham Towers Condominium from 1988 through 1996 when the unit was owned by Josef and Ora Billig. The Complainant stated that Ms. Surace provided a written response on April 27, 2009, the thirteenth (13th)

⁵ 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.

business day following the Custodian's receipt of said request, in which Ms. Surace indicated that she searched for permits no. 89-103 and 89-560 regarding Josef Billig, 800 Palisade Avenue, and did not locate any permits responsive. The Complainant stated that he never requested permits specifically, but rather sought all records regarding unit 22A from 1988 through 1996 when the unit was owned by Josef and Ora Billig.

Although Ms. Surace communicated verbally with the Complainant regarding his OPRA request on the seventh (7th) business day following the Custodian's receipt of said request in an attempt to clarify said request, neither the Custodian nor Ms. Surace provided the Complainant with a written response to his OPRA request regarding access or acknowledging the amendment to the OPRA request (thus extending the response time) until after the statutorily mandated response time expired.

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, supra.

Nevertheless, the Complainant's OPRA request, as originally submitted on April 7, 2009, sought "records" for Buckingham Towers Condominium without reference to any particular type of record such as inspection reports, permit applications, architectural drawings, etc. The Complainant's request is therefore invalid under OPRA. The court and the Council have previously described the level of specificity required for an OPRA request to be valid.

Specifically, 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),⁶ 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."⁷

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, supra.

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..."

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)."

As previously stated, the Complainant in this instant matter sought "records" without reference to any particular type of record. The Complainant verbally amended his request to seek records regarding unit 22A in Buckingham Towers Condominium from 1988 through 1996 when the unit was owned by Josef and Ora Billig. However, a verbal amendment is not proper under OPRA since all requests must be submitted in writing pursuant to N.J.S.A. 47:1A-5.g. In any event, the Complainant still failed to identify particular types of records.

Therefore, because the Complainant's request does not identify with reasonable clarity the specific government records sought, said request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Whether the Custodian's delay in responding to the Complainant's request 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.

The Custodian certified that he received the Complainant's request on April 7, 2009 and forwarded said request to the Building Department on said date for a response. The Complainant stated that he spoke to Ms. Judy Surace from the Building Department on April 17, 2009, the seventh (7th) business day following the Custodian's receipt of his request, and verbally amended his request to seek records for unit 22A in Buckingham Towers Condominium from 1988 through 1996 when the unit was owned by Josef and Ora Billig. The Complainant stated that Ms. Surace provided a written response on April 27, 2009, the thirteenth (13th) business day following the Custodian's receipt of said request, in which Ms. Surace indicated that she searched for permits no. 89-103 and 89-560 regarding Josef Billig, 800 Palisade Avenue and did not locate any permits responsive. The Complainant stated that he never requested permits specifically, but rather sought all records regarding unit 22A from 1988 through 1996 when the unit was owned by Josef and Ora Billig.

As previously stated, although Ms. Surace communicated verbally with the Complainant regarding his request on the seventh (7th) business day following the Custodian's receipt of said request, the Custodian's failure to respond in writing to the Complainant's 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 request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

However, because the Complainant's request does not identify with reasonable clarity the specific government records sought, said request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

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 provide the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Complainant's request is ultimately invalid under OPRA because it does not identify with reasonable clarity the specific government records sought. Therefore, it is concluded that the Custodian's actions do

not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 Complainant's request does not identify with reasonable clarity the specific government records sought, said request is invalid under OPRA 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), 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 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 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 provide the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Complainant's request is ultimately invalid under OPRA because it does not identify with reasonable clarity the specific government records sought. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010