



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

Theresa C. Welsh
Complainant

Complaint No. 2009-59

v.

Township of Barnegat (Ocean)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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 Item No. 1 fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, and because request Item No. 2 seeks information rather than an identifiable government record, the Complainant’s request is invalid under OPRA. 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 of 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’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Complainant’s request is 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 22nd Day of December, 2009

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 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Theresa C. Welsh¹
Complainant**

GRC Complaint No. 2009-59

v.

**Township of Barnegat (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

1. Any references to the Complainant's dispute with K. Hovnanian, a private construction company, regarding drainage in the rear of the Complainant's property, including corrective measures to remedy said issue. If the drainage has been corrected, all information as to the time, date and square footage of the property affected and plot survey plans.
2. Does property have a well or dry well?

Request Made: November 5, 2007

Response Made: January 15, 2008

Custodian: Kathleen T. West

GRC Complaint Filed: February 23, 2009³

Background

November 5, 2007

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.

November 5, 2007

Memorandum from the Custodian to the Building Department. The Custodian states that the attached OPRA request has been received by her office. The Custodian requests a response within two (2) business days stating whether any records responsive exist.

November 6, 2007

Memorandum from the Building Department to the Custodian. An employee of the Building Department notes that the Complainant's request should be forwarded to Birdsall Engineering, Inc., the Township's Engineer.

¹ No legal representation listed on record.

² Represented by Jerry Dasti, Esq., of Dasti, Murphy & McGuckin Law Offices (Forked River, NJ).

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

January 14, 2008

Memorandum from Ms. Pat Scott (“Ms. Scott”), Engineer’s Assistant from Birdsall Engineering, Inc. to Ms. Michelle Rivers (“Ms. Rivers”), Clerk Typist with the following attachments:

- Letter from Birdsall Engineering, Inc., to the Complainant dated July 5, 2006.
- Report from Schoor DePalma, Engineers & Consultants, dated January 27, 2006.

Ms. Scott advises that Birdsall Engineering, Inc., has researched their files and found two (2) responsive records, which are attached.

January 15, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the forty-fourth (44th) business day following receipt of such request. The Custodian provides to the Complainant a copy of the memorandum from Birdsall Engineering, Inc., dated January 14, 2008.

February 23, 2009

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

- Complainant’s OPRA request dated November 5, 2007.
- Memorandum from Ms. Scott to Ms. Rivers dated January 14, 2008.
- Letter from Birdsall Engineering, Inc., to the Complainant dated July 5, 2006.
- Report from Schoor DePalma, Engineers & Consultants, dated January 27, 2006.⁴

The Complainant states that she submitted an OPRA request to the Township on November 5, 2007 and received no response from the Custodian.

The Complainant does not agree to mediate this complaint.

March 12, 2009

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

March 19, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated November 5, 2007.
- Memorandum from the Custodian to the Building Department dated November 5, 2007.
- Memorandum from the Building Department to the Custodian dated November 6, 2007.
- Memorandum from Ms. Scott to Ms. Rivers dated January 14, 2008.
- Record Responsive to the Request: Letter from Birdsall Engineering, Inc., to the Complainant dated July 5, 2006.

⁴The Complainant provided additional attachments that are not relevant to the instant complaint.
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- Record Responsive to the Request: Report from Schoor DePalma, Engineers & Consultants, dated January 27, 2006.

The Custodian certifies that her search for the requested records involved forwarding the Complainant's request to Birdsell Engineering, Inc., based on the nature of the request.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on November 5, 2007 and immediately forwarded the request to the Building Department. The Custodian certified that the Building Department advised on November 6, 2007 that the Complainant's request should be forwarded to Birdsell Engineering, Inc. The Custodian certifies that Birdsell Engineering, Inc., forwarded two (2) records pertaining to the dispute mentioned in the Complainant's request to her office on January 14, 2008. The Custodian certifies that the records were provided to the Complainant on January 15, 2008. The Custodian notes that no records regarding corrective actions made to the Complainant's property were provided because the dispute was between the Complainant and K. Hovnanian.

The Custodian certifies that the Township did not possess any records responsive to the Complainant's OPRA request, which is why the request was forwarded to Birdsell Engineering, Inc. The Custodian contends that the Complainant's response was satisfied on January 15, 2008.

Analysis

Whether the Custodian's untimely response violated OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... 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).

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.

In the instant complaint, the Custodian did not respond in writing to the Complainant's OPRA request until the forty-fourth (44th) business day following receipt of the Complainant's request. 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).

Whether the Complainant's request is invalid under OPRA?

The Complainant's request Item No. 1 seeks records referencing a dispute between the Complainant and K. Hovnanian regarding drainage. The Complainant's request Item No. 2 asks whether there is a well on the Complainant's property. Although request Item No. 1 sought records pertaining to a specifically identified subject, the request item fails to identify any specific government records within a particular time frame. Additionally, request Item No. 2 sought information in the form of a response to a question regarding a well on the Complainant's property.

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

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

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

⁷ As stated in Bent, *supra*.

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 Complainant in this matter failed to identify specific government records being sought. The Complainant's request Item No. 1 seeks unspecified records referring to a dispute between the Complainant and K. Hovnanian; no time frame is provided. This request would require the Custodian to conduct research through every file in her possession to locate and identify responsive records. Additionally, the request Item No. 2 sought information in the form of a response to a question. This request fails to specify an identifiable government record.

Therefore, because the Complainant's request Item No. 1 fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, and because request Item No. 2 seeks information rather than an identifiable government record, the Complainant's request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, the GRC notes that although the Complainant's request was invalid under OPRA, the Custodian still undertook the task of searching for and providing records responsive, which the Custodian is not required to do under these circumstances.

Whether the Custodian's untimely response 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’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Complainant’s request is 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 Item No. 1 fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request item, and because request Item No. 2 seeks information rather than an identifiable government record, the Complainant’s request is invalid under OPRA. 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 of 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's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's request is 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009