



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Brian K. Bragg
Complainant

Complaint No. 2010-116

v.

New Jersey Motor Vehicle Commission
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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. Because the Custodian failed 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 is overly broad, fails to identify a specific government record sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request item, 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 violated N.J.S.A. 47:1A-5.i. by not responding to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Complainant’s request is invalid under OPRA because it is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research. 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 25th Day of January, 2011

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

Brian K. Bragg¹
Complainant

GRC Complaint No. 2010-116

v.

New Jersey Motor Vehicle Commission²
Custodian of Records

Records Relevant to Complaint: Any and all information that is not exempt from disclosure under the New Jersey Open Public Records Act regarding Monique Spencer, last known address: West Street, Bordentown, New Jersey; including the New Jersey Department of Motor Vehicle Driver's Testing, titles, licenses, current and past registration addresses, Vision and Knowledge test, written license test, driving under the influence tickets, speeding tickets, accident records, hit and run records, license suspension records.

Request Made: March 8, 2010

Response Made: June 28, 2010

Custodian: Joseph F. Bruno

GRC Complaint Filed: June 4, 2010³

Background

March 8, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on a request for production of records from U.S. District Court, captioned Brian Keith Bragg v. Dr. Rakesh Agarwal, Docket No. 07-4331, and referring to OPRA.

June 4, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a summons in the matter of Brian Keith Bragg v. Dr. Rakesh Agarwal, Docket No. 09-4331 (GEB), United States District Court, dated September 21, 2009.

The Complainant states that on March 25, 2010⁴ he mailed an OPRA request to the Custodian requesting the last known address of Monique Spencer⁵ and other

¹ No legal representation listed on record.

² Represented by Steven Robertson, Esq., Director, Legal & Regulatory Affairs, New Jersey Motor Vehicle Commission.

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

⁴ The GRC's examination of the Complainant's request disclosed that the request is dated March 8, 2010.

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information pertaining to them. The Complainant states the information is necessary to subpoena them as witnesses at a civil trial.

The Complainant agrees to mediate this complaint.

June 8, 2010

Offer of Mediation sent to the Custodian.

June 11, 2010

The Custodian agrees to mediate this complaint.

June 15, 2010

Complaint is referred to mediation.

June 28, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixty-fifth (65th) business day following the Complainant's submission of the request.⁶ The Custodian states that he did not immediately respond to the Complainant's OPRA request because it appeared from the request itself that the Complainant was seeking discovery pursuant to civil litigation rather than a request for records pursuant to OPRA. The Custodian states that he processed the Complainant's submission as part of a litigation file and not as an OPRA request. The Custodian also states that after the Complainant filed a Denial of Access Complaint, the Complainant's request was re-examined and the Custodian realized that the Complainant was seeking records under OPRA.

The Custodian denies access to the requested records stating that the information sought is personal information and is exempt from disclosure under OPRA pursuant to the New Jersey Driver's Privacy Protection Act ("DPPA"), N.J.S.A. 39:2-3.3. The Custodian also informs the Complainant that the DPPA expressly prohibits the Motor Vehicle Commission ("MVC") from "knowingly disclosing or otherwise making available to any person, personal information about any individual obtained by the MVC in connection with a motor vehicle record." N.J.S.A. 39:2-3.4. Furthermore, the Custodian states that the procedure for obtaining MVC records that contain personal information is set forth at N.J.S.A. 39:2-3.4b and encloses a copy of the appropriate request forms and the DPPA for the Complainant's reference.

September 27, 2010

Complaint is referred back from mediation.

⁵ The Complainant asserted in the Denial of Access Complaint that the Custodian denied him access to records pertaining to Patricia Laramore, as well as Monique Spencer. However, the GRC's examination of the Complainant's OPRA request disclosed that the request did not contain the name of Patricia Laramore. Therefore, the Council declines to address whether the Custodian unlawfully denied access to records concerning Patricia Laramore.

⁶ There is no evidence in the record indicating when the Custodian received the Complainant's OPRA request.

September 27, 2010

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

October 4, 2010

Custodian’s SOI with the following attachments:⁷

- Complainant’s OPRA request dated March 8, 2010
- Letter from the Custodian to the Complainant dated June 28, 2010

The Custodian asserts that the requested records contain personal information and are exempt from disclosure pursuant to the DPPA. The Custodian further asserts that the MVC is prohibited from “knowingly disclosing or otherwise making available to any person personal information about any individual obtained by the MVC in connection with a motor vehicle record.” N.J.S.A. 39:2-3.4.

October 7, 2010

Letter from the Complainant to the Custodian. The Complainant informs the Custodian that this matter does not have to proceed any further if the Custodian provides the Complainant with the requested information. The Complainant states that he needs these persons’ addresses so that they may serve as witnesses in an upcoming civil trial. The Complainant certifies that Monique Spencer is not a victim of any crime of which the Complainant was convicted; thus this information should be provided to the Complainant.

October 14, 2010

Letter from the Custodian to the Complainant. The Custodian responds to the Complainant’s letter dated October 7, 2010. The Custodian again informs the Complainant that the requested information is considered personal information and as such is specifically exempt from disclosure under OPRA and the DPPA. In addition, the Custodian states that since this matter is currently before the GRC the Complainant should forward any inquiries regarding his complaint to the GRC.

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,

⁷ The Custodian attached additional materials which are not relevant to the adjudication of this complaint. Brian K. Bragg v. New Jersey Motor Vehicle Commission, 2010-116 – Findings and Recommendations of the Executive Director

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 evidence of record indicates that the Complainant made an OPRA request for any and all information regarding Monique Spencer on March 8, 2010. The evidence of record further indicates that the Custodian responded in writing to the Complainant’s OPRA request on June 28, 2010, the sixty-fifth (65th) business day after the Complainant sent such request. The Custodian denied access to the requested records on the grounds that the records sought are exempt from disclosure under OPRA pursuant to the New Jersey Drivers’ Privacy Protection Act, N.J.S.A. 39:2-3.3.

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.⁸ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i, and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The evidence of record also indicates that based on the format of the request, the Custodian believed the Complainant’s OPRA request to be a request for discovery and thus did not treat it as an OPRA request, *i.e.*, respond in writing within the statutorily-mandated seven (7) business day response period. The Custodian has stated that he only became aware that the Complainant’s request was made pursuant to OPRA when he

⁸ 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.

received a copy of the Denial of Access Complaint. Nevertheless, the GRC's review of the Complainant's request discloses that the Complainant's request specifically referenced OPRA; thus, all of the requirements of OPRA applied to the 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).

However, the Complainant's request is overly broad, fails to identify specific government records, 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),⁹ 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."¹⁰

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..."

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

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 the matter before the Council, the Complainant’s request seeks any and all information regarding Monique Spencer. The Complainant’s request failed to identify specific government records sought. The Complainant’s request would require the Custodian to conduct research through every file in his possession to locate and identify responsive records.

Therefore, because the Complainant’s request is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, 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).

In the SOI, the Custodian cited to the Driver’s Protection Privacy Act (“DPPA”) as a basis for the denial of access to the requested records. However, because the Council has determined that the Complainant’s request is invalid under OPRA, the Council declines to address the applicability of the DPPA.

Whether the Custodian’s delay in responding to the OPRA 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.

In the matter before the Council, the evidence of record indicates that the Custodian responded to the Complainant's OPRA request on the sixty-fifth (65th) business day after the Complainant sent same denying access to the requested records on the grounds that they were exempt pursuant to N.J.S.A. 39:2-3.3, et seq. the New Jersey Drivers' Protection Privacy Act. However, the Complainant's request is invalid under OPRA because it is overly broad, fails to identify specific government records sought and would require the Custodian to perform research to respond to the request.

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.i. by not responding to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Complainant's request is invalid under OPRA because it is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research. 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. Because the Custodian failed 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 is overly broad, fails to identify a specific government record sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request item, 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 violated N.J.S.A. 47:1A-5.i. by not responding to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Complainant's request is invalid under OPRA because it is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011