



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Richard Gelber
Complainant

Complaint No. 2011-148

v.

City of Hackensack (Bergen)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 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, the Custodian’s violation of OPRA 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 (Interim Order October 31, 2007).
2. Item No. 1 of the Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record sought 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. Because the Complainant has requested employee tax information (W2 and 1099 forms) that is prohibited from release pursuant to U.S.C. § 6103 (2004), the Custodian did not unlawfully deny the Complainant access to records responsive to Item No. 2 of the Complainant’s request. N.J.S.A. 47:1A-9.a.; Lucente v. City of Union, 2005-213 (July 2006). Therefore, the Custodian has borne her burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
4. Although the Custodian failed to timely respond to the Complainant’s request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met her burden of proving that her denial of access to the requested

records was lawful. N.J.S.A. 47:1A-6. Specifically, request Item No. 1 is invalid under OPRA because it fails to specify an identifiable government record sought, and access to the records responsive to request Item No. 2 were lawfully denied. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Richard Gelber¹
Complainant**

GRC Complaint No. 2011-148

v.

**City of Hackensack (Bergen)²
Custodian of Records**

Records Relevant to Complaint:³

1. A copy of health insurance coverage for all members of the elected governing body (Mayor and Council), as of April 2, 2011
2. Copies of 2010 W2s and/or 1099s for:
 - A. Richard Malagiere, Esq.
 - B. Richard Salkin, Esq.
 - C. Art Koster
 - D. Tomas Padilla

Request Made: April 8, 2011

Response Made: April 21, 2011

Custodian: Debra Heck

GRC Complaint Filed: May 3, 2011⁴

Background

April 8, 2011

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

April 21, 2011

Facsimile from the Complainant to the Custodian. The Complainant states that the allotted time has passed and the Custodian has failed to fulfill the Complainant's request. The Complainant questions the Custodian about the status of the request and when he can expect it to be fulfilled.

¹ No legal representation listed on record.

² Represented by Joseph Zisa, Esq. (Hackensack, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

April 21, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via facsimile to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that in response to Item No. 1 of the request, she will fax the Complainant two (2) different insurance plans that are offered to the Mayor and the Council. The Custodian states that she cannot provide access to Item No. 2 of the Complainant's request because the tax return information is deemed confidential and is not disclosable under OPRA.

The Custodian state that she is aware of her obligations to adhere to the procedures prescribed in OPRA but has recently been in and out of the hospital over the past few weeks due to illness.

April 22, 2011

Facsimile from the Complainant to the Custodian. The Complainant states that he has received the Custodian's April 21, 2011 fax. The Complainant states that he is sorry to hear that the Custodian has been ill. The Complainant asserts that the Custodian has misconstrued his request because the Custodian's response to his request was not satisfactory. The Complainant states that he believes the Custodian is using stall tactics.

The Complainant states that Item No. 1 of his request requires that the Custodian provide him with the coverage status of every family member and type of contract for each family member of the Mayor and City Council. The Complainant further asserts that he is familiar with the law and is aware that the Custodian can redact the tax payer ID numbers and home addresses from Item No. 2 of his request in order to fulfill it.

May 3, 2011

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

- Complainant's OPRA request dated April 8, 2011
- Facsimile from the Complainant to the Custodian dated April 21, 2011
- Facsimile from the Custodian to the Complainant dated April 21, 2011
- Facsimile from the Complainant to the Custodian dated April 22, 2011

The Complainant states that he submitted his OPRA request on April 8, 2011. The Complainant asserts that on April 21, 2011, he faxed a reminder to the Custodian to respond to his OPRA request. The Complainant states that the Custodian returned his April 21, 2011 fax on that same day and partially fulfilled his request.

The Complainant further states that on April 22, 2011, he modified his original request to provide more detail. The Complainant asserts that the Custodian acknowledged receipt of this modified request on April 25, 2011, and as of this Complaint, has yet to supply the request information.

The Complainant agrees to mediate this complaint.

May 5, 2011

Offer of Mediation sent to the Custodian.

June 15, 2011

Letter from the GRC to the Custodian. The GRC states that it has not received any correspondence from the Custodian regarding the May 5, 2011 Offer of Mediation.

June 15, 2011

Letter from the Custodian to the GRC. The Custodian states that she is ill and has recently been out of the office. The Custodian further asserts that it is likely she will be in and out of the office in the future.

July 8, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.⁵

January 17, 2012

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on July 8, 2011, but has yet to receive a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

January 17, 2012

Custodian’s SOI, attaching a copy of the Complainant’s OPRA request dated April 8, 2011.

The Custodian certifies that her request for the records involved a search throughout the City of Hackensack’s numerous departments. The Custodian further certifies that no records were destroyed. The Custodian argues that pursuant to Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), the Complainant has a common law right to access public records that reveal the type of coverage elected by eligible employees, officials, and retirees. The Custodian states that this common law right is not absolute because when there is a determination that the documents sought are public records, the court must balance a citizen’s interest in gaining access to the public records against the State’s interest in confidentiality.

The Custodian maintains that pursuant to OPRA, information that is deemed confidential is not considered a public record. The Custodian contends that “information which is communication between a public agency and its insurance carrier, administrative service organization or risk management office” qualifies as confidential information pursuant to Michelson. The Custodian argues that the Complainant does not have the right to evade the privacy of the Mayor and Council of Hackensack by disclosing coverage status information. The Custodian further maintains that this is a violation of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. The Custodian states that the Complainant was dissatisfied with being faxed two different insurance plans offered to the Mayor and Council as a response to Item No. 1 of the Complainant’s request.

⁵ The Custodian failed to reply to the GRC’s Offer of Mediation.

The Custodian further contends that OPRA does not entitle the Complainant to information that includes the name of every person receiving city health benefits, the reason for those benefits, the type of coverage, and the relevant dependents.

The Custodian argues that Executive Order 26 (McGreevey 2002) exempts personal income tax return or other tax return information from disclosure under OPRA and accordingly, the Complainant is not entitled to the records responsive to Item No. 2 of his request.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian did not respond to the Complainant's April 8, 2011 OPRA request until April 21, 2011, the ninth (9th) business day following the receipt of the Complainant's request. While the Custodian's response was in writing, the Custodian's response was made two (2) days after the statutorily mandated seven (7) business days elapsed.

Therefore, 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, the Custodian's violation of OPRA 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 (Interim Order October 31, 2007).

Whether Item No. 1 of the Complainant's request is valid under 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 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.

Of issue is whether Item No. 1 of the Complainant's request seeking "a copy of health insurance coverage for all members of the elected governing body (Mayor and Council), as of April 2, 2011" is valid under OPRA. Here, the Complainant's request is invalid under OPRA because he has failed to name a specific identifiable record sought.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

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.*

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

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A.

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

⁸ As stated in Bent, *supra*.

47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). Research is not among the custodian's responsibilities.” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, 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...” Accordingly, test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA.

In the instant matter, Item No. 1 of the Complainant’s request does not seek a specifically identifiable record. Instead, the Complainant merely requested information regarding the type of coverage the City’s mayor and council have. Such a request seeks information and fails to identify a specific government record with reasonable specificity. Accordingly, the Complainant’s request Item No. 1 is invalid under OPRA.

Therefore, Item No. 1 of the Complainant’s request is invalid under OPRA because it fails to specify an identifiable government record 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

Whether the Custodian unlawfully denied the Complainant access to the requested 2010 W2s, and 1099 forms?

OPRA states in pertinent part that “[t]he provisions of [OPRA]...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute...” N.J.S.A. 47:1A-9.a.

Moreover, United States law mandates that no officer or employee of the United States or any State “shall disclose any [tax information, declaration of tax, or tax] return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise . . .” 26 U.S.C. § 6103 (2004).

In the instant matter, the Complainant seeks copies of W2s and 1099s from various named officials. In response to the Custodian’s request for such information, the Custodian denied the Complainant access to the tax information on the grounds that the requested information is confidential.

The GRC has previously held that the requirements of the United States law barring the disclosure of tax information extends to OPRA pursuant to N.J.S.A. 47:1A-9.a. In Lucente v. City of Union, 2005-213 (July 2006), the Complainant sought W2 forms. After being denied access to the requested W2 forms, the Complainant filed a Complaint with the GRC seeking relief. The Council found that the Complainant was lawfully denied access to the requested W2 forms because 26 U.S.C. § 6103 (2004) prohibits the release of such information.

As in Lucente, the Complainant in this instant matter seeks employee and officer W2 and 1099 forms, *i.e.*, tax information. As previously stated, access to such information is prohibited by federal law. N.J.S.A. 47:1A-9.a. does not allow the provisions of OPRA to abrogate statutory exemptions to record access.

Accordingly, because the Complainant has requested employee tax information (W2 and 1099 forms) that is prohibited from release pursuant to U.S.C. § 6103 (2004), the Custodian did not unlawfully deny the Complainant access to records responsive to Item No. 2 of the Complainant's request. N.J.S.A. 47:1A-9.a.; Lucente v. City of Union, 2005-213 (July 2006). Therefore, the Custodian has borne her burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

Whether the Custodian's actions rise 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 (Felder 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)).

In the matter before the Council, although the Custodian failed to timely respond to the Complainant's request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met her burden of proving that her denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Specifically, request Item No. 1 is invalid under OPRA because it fails to specify an identifiable government record sought, and access to the records responsive to request Item No. 2 were lawfully denied. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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, the Custodian's violation of OPRA 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 (Interim Order October 31, 2007).
2. Item No. 1 of the Complainant's request is invalid under OPRA because it fails to specify an identifiable government record sought 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
3. Because the Complainant has requested employee tax information (W2 and 1099 forms) that is prohibited from release pursuant to U.S.C. § 6103 (2004), the Custodian did not unlawfully deny the Complainant access to records responsive to Item No. 2 of the Complainant's request. N.J.S.A. 47:1A-9.a.; Lucente v. City of Union, 2005-213 (July 2006). Therefore, the Custodian has borne her burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

4. Although the Custodian failed to timely respond to the Complainant's request and therefore violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian met her burden of proving that her denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. Specifically, request Item No. 1 is invalid under OPRA because it fails to specify an identifiable government record sought, and access to the records responsive to request Item No. 2 were lawfully denied. The evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. 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: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012