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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Jerry W. Pecaro
Complainant
v.
Berkeley Heights Police Department (Union)
Custodian of Record

Complaint No. 2011-182, 2011-183,
2011-184, 2011-185 & 2011-186

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 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. The Custodian did not timely respond to the Complainant's OPRA requests. As such, 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 (Interim Order October 31, 2007).

2. Because the Complainant's requests fail 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 requests, the Complainant's requests are overly broad and is invalid under OPRA 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. The Custodian violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's two (2) OPRA requests. However, the Complainant's two (2) requests are invalid under OPRA because they fail to specifically identify a government record. Additionally, 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 18th Day of December, 2012

Robin Berg Tabakin, 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: December 20, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting

Jerry W. Pecaro[1]
Complainant

GRC Complaint Nos. 2011-182, 2011-183, 2011-184, 2011-185 & 2011-186

v.

Berkeley Heights Police Department (Union)[2]
Custodian of Records

Records Relevant to Complaint:

April 26, 2011 OPRA Request:[3]

1. Any and all records, official police reports, complaints, memoranda, correspondence or files between Sergeant Frank Fortunato ("Sergeant Fortunato") of the Berkeley Heights Police Department ("Police Department"), the Complainant and Ms. Theresa Pecaro ("Ms. Pecaro") regarding internal investigation forms and filed documents between 2007 and 2009.[4]
2. Any and all records, official police reports, complaints, memoranda, correspondence or files between Police Chief David Zager ("Chief Zager") and Sergeant Fortunato regarding any and all complaints made by the Complainant and Ms. Pecaro pertaining to harassment incidents by Officer Michael Mathis ("Officer Mathis") of the Police Department between 1998 and 2010.[5]
3. Any and all records, official police reports, complaints, memoranda, correspondence or files between Sergeant Stephen Stamler ("Sergean Stamler") and Captain Andrew Moran ("Captain Moran") of the Police Department and the Complainant and Ms. Pecaro regarding Officer Mathis and his harassment of the Complainant and Ms. Pecaro and their children between 1998 and 2010.[6]
4. Any and all records, official police reports, complaints, memoranda, correspondence or files between Chief Zager and the Complainant and Ms. Pecaro regarding Officer Mathis swerving in the direction of his daughter while operating police vehicle UW652Z between 2006 and 2008.[7]

[1] No legal representation listed on record.
[2] Represented by Tom Scrivo, Esq., of McElroy, Deutsch, Mulvaney, & Carpenter, LLP (Morristown, NJ).
[3] The Complainant filed four (4) separate OPRA requests for these records. All of these requests were the subject of the Denial of Access Complaint. However, due to the commonality of the parties and the date of the requests, the GRC refers to these requests as a single request for the purposes of this adjudication.
[4] This request is the subject of GRC Complaint No. 2011-182.
[5] This request is the subject of GRC Complaint No. 2011-183.
[6] This request is the subject of GRC Complaint No. 2011-185.
[7] This request is the subject of GRC Complaint No. 2011-186.

April 30, 2011 OPRA Request: Any and all complaints, files or memoranda between the Police Department and the Complainant and Ms. Pecaro regarding Officer Mathis and Complaint ORI No. NJ0143800 for reckless driving, harassment, trespassing, stalking and invasion of privacy on September 6, 2007.[8]

Request Made: April 26, 2011 and April 30, 2011
Response Made: May 11, 2011
Custodian: Jacqueline D. Testa
GRC Complaint Filed: May 24, 2011[9]

Background

April 26, 2011

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that he prefers to pick up the requested records.

April 30, 2011

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that he prefers to pick up the requested records.

May 11, 2011

Custodian's response to the Complainant's first (1st) and second (2nd) OPRA requests. The Custodian responds in writing on the Complainant's OPRA request forms on the eleventh (11th) and eighth (8th) business days, respectively, following receipt of such requests. The Custodian states that access to the requested records is denied pursuant to the New Jersey Attorney General Guidelines. The Custodian also states that records involving the Internal Affairs Policy and Procedures must remain confidential.

May 24, 2011

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

- Complainant's first (1st) OPRA request dated April 26, 2011
- Complainant's second (2nd) OPRA request dated April 30, 2011
- Custodian's response to the Complainant's first (1st) and second (2nd) OPRA requests dated May 11, 2011.

The Complainant states that the Custodian improperly denied him access to the records responsive to his OPRA requests. The Complainant also states that the records requested were written by himself or Ms. Pecaro. The Complainant argues that since he and Ms. Pecaro are the aggrieved parties listed on the requested records, he is entitled to copies of all these records.

[8] This request is the subject of GRC Complaint No. 2011-184.
[9] The GRC received the Denial of Access Complaint on said date.

The Complainant does not agree to mediate this complaint.

May 31, 2011

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

June 6, 2011

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated April 26, 2011
- Complainant's second (2nd) OPRA request dated April 30, 2011
- Custodian's response to the Complainant's first (1st) and second (2nd) OPRA requests dated April 26, 2011 and April 30, 2011 dated May 11, 2011.

The Custodian certifies that the records that may have been responsive to the OPRA requests must be permanently maintained in accordance with the Records Destruction Schedule established and approved by Records Management Services. [10]

The Custodian certifies that she received the Complainant's first (1st) OPRA request on April 26, 2011. The Custodian also certifies that she received the Complainant's second (2nd) OPRA request on April 30, 2011. The Custodian further certifies that she responded in writing to the Complainant's first (1st) and second (2nd) OPRA requests on May 11, 2011. The Custodian additionally certifies that she denied the Complainant access to the responsive records pursuant to the New Jersey Attorney General Guidelines because records involving Internal Affairs Policy and Procedures must remain confidential.[11]

June 6, 2011

Telephone call from the GRC to the Custodian. The GRC requests the Custodian provide a copy of the New Jersey Attorney General Guidelines involving the Internal Affairs Policy and Procedures.

June 7, 2011

Facsimile from the Custodian to the GRC. The Custodian encloses a copy of the New Jersey Attorney General Guidelines regarding the Internal Affairs Policy and Procedures. These procedures state that the contents of the internal investigation files shall be retained in the internal affairs unit and clearly marked as confidential and only be released under the following circumstances:

> "1) in the event that administrative charges have been brought against an officer, and a hearing will be held, a copy of those internal investigation reports to be used as evidence in the administrative hearing shall be provided to the officer; 2) in the event that the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal investigation, a copy of the internal investigation reports may be released to the

[10] The Custodian did not certify to the search undertaken to locate the records responsive.

[11] The Custodian made no legal arguments or factual assertions in support of her Statement of Information.

attorney representing the subject officer, agency or jurisdiction; 3) upon the request or at the direction of the county prosecutor or Attorney General and 4) upon a court order."

Analysis

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

OPRA 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.[12] 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).

In the instant complaint the Complainant filed his two (2) OPRA requests on April 26, 2011 and April 30, 2011. The Custodian responded in writing to the Complainant's OPRA requests on the OPRA request forms on May 11, 2011. The Custodian responded on the eleventh (11th) and eighth (8th) business days, respectively, following receipt of such requests.

[12] 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.

Therefore, the Custodian did not timely respond to the Complainant's OPRA requests. As such, 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*.

Whether the Complainant's records requests are 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.

In the instant complaint the Complainant filed two (2) OPRA requests which sought "any and all records, official police reports, complaints, memoranda, correspondence or files" regarding several different subject matters from internal investigation forms to harassment incidents between members of the Police Department and the Complainant and Ms. Pecaro. Here, the Complainant's request is invalid under OPRA because he has failed to name specific identifiable records sought and because the request is overly broad.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),[13] 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."[14]

Moreover, 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. 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

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

[14] As stated in Bent, *supra*.

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, the test under MAG then, is whether a requested record is a ***specifically identifiable*** government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant's request sought:

- Item No. 2: "From the Borough Engineer's files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer's files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney's files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney's files: all documents related to the development or modification to North Street, to the south and east of Wilson St."

In reviewing the complainant's request, the Council found 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's OPRA requests are overly broad and unclear and do not specifically identify a government record sought. The Complainant's requests seek broad categories of records pertaining to a particular subject matter. The Complainant's OPRA requests would have the Custodian not only search, but research, all police reports, complaints, memoranda, correspondence or files in the agency's possession to determine if such records are relevant to the harassment incidents or any internal investigation

forms filed by the Complainant or Ms. Pecaro. Thus, the Complainant's requests are invalid under OPRA.

Therefore, because the Complainant's requests fail 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 requests, the Complainant's requests are overly broad and is invalid under OPRA 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's delayed response to the Complainant's OPRA 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).

The Custodian violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's two (2) OPRA requests. However, the Complainant's two (2) requests are invalid under OPRA because they fail to specifically identify a government record. Additionally, 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. The Custodian did not timely respond to the Complainant's OPRA requests. As such, 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 (Interim Order October 31, 2007).

2. Because the Complainant's requests fail 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 requests, the Complainant's requests are overly broad and is invalid under OPRA 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. The Custodian violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. by failing to timely respond to the Complainant's two (2) OPRA requests. However, the Complainant's two (2) requests are invalid under OPRA because they fail to specifically identify a government record. Additionally, 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: Harlynne A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012[15]

[15] This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.