



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 25, 2013 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2012-223

v.

Ocean County Health Department
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 bore her burden of proof that she timely responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6, because the Custodian responded in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. See 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. The Custodian did not violate OPRA by failing to provide the Complainant with a copy of the OPRA request form dated July 18, 2012, because nothing in the evidence of record reveals the Complainant submitted an OPRA request for said request form and the Custodian is not otherwise obligated to provide a copy of the document. See Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009).
3. The Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 1 because the Custodian properly informed the Complainant in a timely manner that said records were available for inspection, which was the Complainant’s preferred method of disclosure.
4. The Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 2 because the Complainant provided proof in her Denial of Access Complaint that copies of the requested records were in her possession at the time she filed the request for said records. Therefore, the Complainant could not have been denied access to the requested records because she already had in her possession at the time of the request the records she sought



pursuant to OPRA. *See* Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).

5. The Complainant's request item number 3 is an invalid request that fails to seek identifiable government records. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6. *See also* Toscano v. NJ Department of Labor, Division of Vocational Rehabilitations Services, GRC Complaint No. 2010-293 (March 2012).

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 June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2012-223

v.

**Ocean County Health Department²
Custodian of Records**

Records Relevant to Complaint:

1. Inspection and/or copy by e-mail upon request the file for Jackson Memorial High School kitchen/cafeteria renovation.
2. A copy of the list of all public and non-public schools inspected by the Board of Health in both Lakewood and Jackson.
3. E-mail all public school files for Lakewood.

Request Made: July 18, 2012

Response Made: July 27, 2012

GRC Complaint Filed: July 30, 2012³

Background⁴

Request and Response:

On July 18, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records. On July 27, 2012, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that she could inspect the file for Jackson Memorial High School kitchen/cafeteria renovation by scheduling an appointment with the Custodian.⁵ The Custodian also informed the Complainant that there is no list of all public and non-public schools inspected by the Board of Health in both

¹ No legal representation listed on record.

² Victoria Miragliotta, Custodian of Records. Represented by Lauren Dooley, Esq., of Berry, Sahradnik, Kotzas & Benson (Toms River, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Custodian also informed the Complainant that the copying cost for copies, based upon fifty pages at \$0.05 per page, would be \$2.50. The Custodian further informed the Complainant that the records were not available electronically, but that they could be converted to an electronic file available via e-mail for \$0.30 per page. The Custodian informed the Complainant that the records could be faxed to the Complainant at no cost to the Complainant.

Lakewood and Jackson. Finally, the Custodian denied the Complainant's request for all public school files for Lakewood because the Custodian asserted that the request was overly broad and unclear.

Denial of Access Complaint:

On July 30, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that she provided her request to the Custodian on July 18, 2012, and that the Custodian responded to her request on July 27, 2012.

The Complainant states that she visited the Ocean County Health Department on July 18, 2012, at which time she completed and submitted to the assistant records custodian an OPRA request for the records relevant to the complaint. The Complainant states that, although the Custodian did not give her a copy of the OPRA request, the Custodian did itemize the three request items on the Custodian's July 27, 2012 response. The Complainant alleges that the Custodian indicated that it was the Custodian's right to take as much time as permitted to provide access. In support of this allegation, the Complainant states that the Custodian's response provides "...the seven (sic) (7th) business day deadline to respond to your request is July 27, 2012. This answer is being furnished to you on the 7th day following your request."

The Complainant also states that the Custodian failed to provide her with a copy of the OPRA request which formed the basis of the complaint. The Complainant states that she is entitled to appeal the Custodian's denial of her request for access to the GRC or a court of law pursuant to N.J.S.A. 47:1A-6. The Complainant contends that OPRA requests are documents that can be submitted into evidence in a legal proceeding. As such, the Complainant states that the Custodian has deprived her of her right of due process by failing to provide her with a copy of the OPRA request.

The Complainant further states that the Custodian offered to make a copy of the records responsive to request item number 1, a fifty (50) page record at \$0.30 per page for a total of \$15.00. However, the Complainant states that she had already received that same record from the agency in March 2012 at no cost. The Complainant states that when the record was provided to her in March it totaled only twenty-two (22) pages in length.

The Complainant asserts that the Custodian alleged that the record responsive to request item number 2 does not exist. However, the Complainant states that she obtained a copy of the same record in March 2012 and she references the requested record as an attachment to the complaint. The Complainant further states that the Custodian alleged the request for item number 3 was overly broad and unclear, but the Complainant states the Custodian did not contact her to seek clarification of the request before denying it as overly broad.

The Complainant contends she is entitled to a finding by the GRC that the Custodian violated OPRA by:

1. Deliberately taking longer than required to respond to the Complainant's request;

2. Failing to provide the Complainant with a copy of the OPRA request which formed the basis of the complaint; and
3. Improperly denying the Complainant access to the requested records.

Statement of Information:

On August 17, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on July 18, 2012, and that she responded to the request on July 27, 2012. The Custodian certifies that by responding to the Complainant’s OPRA request on July 27, 2012, she responded within the seven (7) business day period as required under OPRA.

The Custodian certifies that the records responsive to request item number 1 were not denied. The Custodian certifies that she informed the Complainant that the records were available for inspection upon appointment; however, the Custodian contends the Complainant never contacted the Custodian to make an appointment to examine the records following the Complainant’s receipt of the Custodian’s response. The Custodian also certifies that she gave the Complainant other options. The Custodian certifies that she provided to the Complainant the total amount the Complainant would have to remit to receive copies of the records, as well as the cost for converting the records into an electronic format for e-mail delivery. The Custodian also certified that the records could be faxed to the Complainant at no cost. The Custodian certifies that the Complainant never contacted her with respect to exercising any other options. The Custodian certifies that, although the Complainant stated request item number 1 was comprised of twenty-two (22) pages, the file has since grown larger because it now includes architectural plans.

The Custodian also certifies that the records responsive to request item number 2, a list of all public and non-public schools inspected by the Board of Health in both Lakewood and Jackson, is nonexistent. The Custodian denied the Complainant’s request for request item number 3, all public school files for Lakewood, because the Custodian asserted that the request was overly broad and unclear.

Analysis⁶

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

⁷ 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.

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).

OPRA provides that “[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5(e).

Here, it is undisputed that the Complainant filed her OPRA request on July 18, 2012, and that the Custodian responded in writing to the Complainant’s request on July 27, 2012, granting access in part and denying access in part. The records responsive to the Complainant’s request consisted of an inspection report, list of inspections, and other school files, and as such, were not immediate access records. Accordingly, the Custodian properly responded to the Complainant’s request in a timely manner on the seventh (7th) business day following receipt of the request.

Therefore, the Custodian bore her burden of proof that she timely responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6, because the Custodian responded in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra.

Failure to provide the Complainant with a copy of the OPRA request form

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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).

The Complainant asserted that the GRC should find that the Custodian violated OPRA because the Custodian failed to provide the Complainant with a copy of the July 18, 2012 OPRA request. The Complainant’s only argument in support of this assertion is that an OPRA request could be of evidentiary value in a future judicial or quasi-judicial proceeding; therefore, the Custodian’s failure to provide a copy of the document to the Complainant violated the Complainant’s right of due process.

However there is no evidence of record to indicate the Complainant filed an OPRA request for a copy of the July 18, 2012 OPRA request form. Therefore, there is no issue before the Council with respect to a denial of access for the Complainant’s OPRA request form.

OPRA does provide that when a custodian denies access, the custodian shall indicate the specific basis for the denial on the request form and return it to the requestor. See N.J.S.A. 47:1A-5(g). This provision in the context of section 5, however, is to ensure the custodian properly responds to an OPRA request, not to require the custodian to provide the requestor with a copy of the request. Ever since the Council decided Renna v. Township of Warren (Somerset),

GRC Complaint No. 2008-40 (April 2009), it has repeatedly held 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 the response is not on the agency's official OPRA request form***, is a valid response pursuant to OPRA." (Emphasis in original.) Accordingly, N.J.S.A. 47:1A-5(g) does not require a custodian to provide a requestor with a copy of the OPRA request form.

Here, rather than returning a signed copy of the Complainant's request form to the Complainant, the Custodian responded to the Complainant via a letter. As such, it was unnecessary for the Custodian to also return the OPRA request form with notations to the Complainant. If the Complainant wanted to retain a copy of the OPRA request form dated July 18, 2012, she should have made a copy before submitting the form to the Custodian. The request form contains a mailing address, fax number and several e-mail addresses to facilitate prompt submission to the agency by requestors.

Accordingly, the Custodian did not violate OPRA by failing to provide the Complainant with a copy of the OPRA request form dated July 18, 2012, because nothing in the evidence of record reveals the Complainant submitted an OPRA request for said request form and the Custodian is not otherwise obligated to provide a copy of the document. *See Renna, supra.*

Unlawful Denial of Access

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.

Request item number 1 - inspection and/or copy by e-mail upon request the file for Jackson Memorial High School kitchen/cafeteria renovation.

The Complainant requested an inspection of the records responsive to request item number 1. The Custodian responded to the Complainant's request, informing the Complainant that said records were available for inspection upon appointment. The Custodian also informed the Complainant that other options for disclosure of the requested records included providing copies to the Complainant or converting the records into an electronic format for disclosure via e-mail. The Custodian provided the Complainant with the total cost for each of these services. The Custodian also informed the Complainant that the requested records could be faxed to the Complainant at no charge.

Although the Custodian provided the Complainant with options other than inspecting the requested records, the Custodian did not need to do so because the Complainant did not request disclosure by any means other than inspection. The Complainant requested the records be made available for inspection "and/or copy by e-mail ***upon request***" (emphasis added). The evidence of record reveals that the Complainant did not at any time request that the records be disclosed via e-mail in addition to inspection or be disclosed via e-mail rather than inspection. The

Custodian certified that she made the records available for inspection by the Complainant upon appointment; however, the Complainant never contacted the Custodian to schedule an appointment for the inspection.

Accordingly, the Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 1 because the Custodian properly informed the Complainant in a timely manner that said records were available for inspection, which was the Complainant's preferred method of disclosure.

Request item number 2 - the list of all public and non-public schools inspected by the Board of Health in both Lakewood and Jackson.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request item number 2 are nonexistent. Conversely, the Complainant asserted that the requested records do exist. In her complaint, the Complainant stated, "[a]ttached please find copies of the requested documents that [the Custodian] asserted above do not exist, which I received from the board in March." The Complainant attached to her complaint a two (2) page document titled "Last Inspection Report by Name" dated March 13, 2012, for Lakewood and a one (1) page document titled "Last Inspection Report by Name" dated March 14, 2012, for Jackson. The Complainant filed a request for the records responsive to request item number 2 on July 18, 2012.

In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. With respect to this issue, the court noted:

"...[i]t is undisputed that Bart at all times had within his possession a copy of the cover letter at issue; indeed, he attached a copy to the complaint he filed with the Council. He could not have been denied access to the document, however, if he already had the document he sought." *Id.* at 618.

The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant "...does not...advance the purpose of OPRA, which is to ensure an informed citizenry." *Id.* (citations omitted).

Here, as in Bart, *supra*, the Complainant already had in her possession at the time of the OPRA request the document she sought pursuant to OPRA. Identical to the facts in Bart, the

Complainant in the instant matter attached a copy of the requested record to the complaint she filed with the GRC. As such, the complainant could not have been denied access to request item number 2.

Accordingly, the Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 2 because the Complainant provided proof in her Denial of Access Complaint that copies of the requested records were in her possession at the time she filed the request for said records. Therefore, the Complainant could not have been denied access to the requested records because she already had in her possession at the time of the request the records she sought pursuant to OPRA. See Bart, *supra*.

Request item number 3 - all public school files for Lakewood.

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 reasoned that:

“[m]ost 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.” [Emphasis added]. *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.* See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Toscano v. NJ Department of Labor, Division of Vocational Rehabilitations Services, GRC Complaint No. 2010-293 (March 2012), the complainant requested “a copy of the case file of [a named individual].” The GRC determined that the complainant’s request was overbroad in that it sought “...an entire case file without ...a party seeking records cannot make a broad request for all of a state agency’s records and should properly name specific records so that a

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Custodian will not have to conduct research or fulfill an overly broad request that is outside the scope of [his/her] duties.”

Here, the Complainant requested files for every public school in the Township of Lakewood, but failed to specifically identify any government records.

As such, the Complainant’s request item number 3 is an invalid request that fails to seek identifiable government records. MAG, *supra*; Bent, *supra*; NJ Builders, *supra*. Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6. *See also* Toscano, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore her burden of proof that she timely responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6, because the Custodian responded in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. *See* 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. The Custodian did not violate OPRA by failing to provide the Complainant with a copy of the OPRA request form dated July 18, 2012, because nothing in the evidence of record reveals the Complainant submitted an OPRA request for said request form and the Custodian is not otherwise obligated to provide a copy of the document. *See* Renna v. Township of Warren (Somerset), GRC Complaint No. 2008-40 (April 2009).
3. The Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 1 because the Custodian properly informed the Complainant in a timely manner that said records were available for inspection, which was the Complainant’s preferred method of disclosure.
4. The Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 2 because the Complainant provided proof in her Denial of Access Complaint that copies of the requested records were in her possession at the time she filed the request for said records. Therefore, the Complainant could not have been denied access to the requested records because she already had in her possession at the time of the request the records she sought pursuant to OPRA. *See* Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008).
5. The Complainant’s request item number 3 is an invalid request that fails to seek identifiable government records. MAG Entertainment, LLC v. Division of Alcoholic

Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6. *See also* Toscano v. NJ Department of Labor, Division of Vocational Rehabilitations Services, GRC Complaint No. 2010-293 (March 2012).

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013