



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

August 27, 2013 Government Records Council Meeting

David E. Pflueger
Complainant

Complaint No. 2012-327

v.

County of Cumberland Health Department
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 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. Custodian Ken Mecouch did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, Custodian Mecouch’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. Custodian Ken Mecouch failed to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian; therefore he violated N.J.S.A. 47:1A-5(h). See also Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), and Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).
3. The Complainant’s request is invalid under OPRA because it fails to reasonably specify identifiable government records and requires the Custodian to conduct research outside the scope of her duties. The request is merely seeking information. As such, Custodian Melissa Bourgeois lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6. See 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). See also Herron v. Township of Montclair, GRC Complaint No. 2008-46 (April 2009).
4. The evidence of record reveals that Custodian Ken Mecouch’s failure to respond in writing within the statutorily mandated time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Custodian Mecouch’s

failure to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian violated N.J.S.A. 47:1A-5(h). However, the Complainant's request was not a valid request for government records; therefore, notwithstanding Custodian Mecouch's "deemed" denial, there was no unlawful denial of access. Further, 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, the Custodian's unlawful denial of access did 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 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**David E. Pflueger¹
Complainant**

GRC Complaint No. 2012-327

v.

**County of Cumberland Health Department²
Custodial Agency**

Records Relevant to Complaint: A list of:

1. All water wells drilled in Cumberland County from January 1, 2007 to December 7, 2012.
2. All sewage systems installed in Downe Township in the last ten years 2002 – 2012.

Custodian of Records: Melissa Bourgeois

Request Received by Custodian: December 7, 2012

GRC Complaint Received: December 26, 2012

Response Made by Custodian: December 31, 2012

Background³

Request and Response:

On December 7, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed records to Cumberland County Custodian Ken Mecouch.⁴ On December 31, 2012, the fifteenth (15th) business day following receipt of said request, County Health Department Custodian Melissa Bourgeois responded in writing denying the request because the request seeks information and does not identify specific government records, and as such, is not a valid request. The Custodian cites New Jersey Builders Association v. New Jersey Council on Affordable Housing, 381 N.J.Super. 30, 37 (App. Div. 2005) and Bent v. Stafford Police Department, 390 N.J.Super. 166, 180 (App. Div. 2007) in support of her denial.

¹ No legal representation listed on record.

² Represented by Theodore E. Baker, Esq. (Bridgeton, NJ).

³ 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.

⁴ The OPRA request form submitted by the Complainant is captioned, “County of Cumberland Public Records Request Form.” The form instructs requestors: “[t]o request access to public records, file this form with Ken Mecouch, Cumberland County Interim Custodian of Records.”

Denial of Access Complaint:

On December 26, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the OPRA request to the Custodian on December 7, 2012, and did not receive a response. The Complainant states that he sent a follow-up e-mail to Custodian Ken Mecouch on December 17, 2012, but it went ignored.

Statement of Information:

On December 31, 2012, the Custodian’s Counsel, on behalf of County Health Department Custodian Melissa Bourgeois, filed a Statement of Information (“SOI”). The Custodian’s Counsel certifies that the date the OPRA request was received is unknown because “...for some reason the Board of Health had no notice of the request.” Counsel certifies that when the Cumberland County Department of Health finally received the request on December 31, 2012, Custodian Bourgeois responded to the request that same date denying it as overly broad.

Analysis⁵

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).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).

Here, the Custodian named on the OPRA request, Ken Mecouch, was provided with the request on December 7, 2012, but failed to respond to the request. The evidence of record reveals the Complainant sent a follow-up e-mail to Custodian Mecouch on December 17, 2012, asking when he could expect a response to his OPRA request; however, the Custodian failed to reply to, or otherwise acknowledge, the e-mail.

Therefore, Custodian Mecouch did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, Custodian Mecouch’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access,

⁵ 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.

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.

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.

Moreover, Custodian Mecouch failed to forward the OPRA request in a timely manner to County Health Department Custodian of Records, Melissa Bourgeois, so that she could respond to the request within the statutorily-mandated seven business day period. OPRA provides “[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5(h).

The Council has consistently held that an employee of a public agency who receives an OPRA request must either direct the requestor to the custodian or forward the requestor’s OPRA request to the custodian. In Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), the Council determined that because the employee who received an OPRA request did not forward the request to the custodian or direct the requestor to the custodian, the employee violated N.J.S.A. 47:1A-5(h). Similarly, in Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the Council found that because an employee improperly forwarded the complainant’s OPRA request to the custodian the employee violated N.J.S.A. 47:1A-5(h).

Here, Counsel asserted that the Health Department had no notice of the request until it was finally forwarded to Custodian Bourgeois on December 31, 2012, which was fifteen (15) business days following receipt of the request by Custodian Mecouch.

Accordingly, Custodian Ken Mecouch failed to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian; therefore he violated N.J.S.A. 47:1A-5(h). See also Mourning, supra, and Vessio, 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.

The Appellate Division 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),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

In Herron v. Township of Montclair, GRC Complaint No. 2008-46 (April 2009), where a complainant sought statistical information regarding juvenile offenders, the Council determined that “...(b)ecause the Complainant’s request does not specify identifiable government records and would require the Custodian to conduct research and create a new record, the Complainant’s OPRA request is invalid pursuant to MAG Entertainment LLC. V. Div. 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).”

Here, in both request items numbered 1 and 2, the Complainant sought a list of services allegedly performed by the County; he did not request a specifically identifiable government record. Custodian Melissa Bourgeois in the County Health Department received the Complainant’s request on December 31, 2012, and responded to the request on that same date informing the Complainant that it was not a valid request because it sought information and did not identify specific government records.

Accordingly, the Complainant’s request is invalid under OPRA because it fails to reasonably specify identifiable government records and requires the Custodian to conduct research outside the scope of her duties. The request is merely seeking information. As such, Custodian Melissa Bourgeois lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6. See MAG, *supra*, and Bent, *supra*. See also Herron *supra*.

Knowing & Willful

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 “... [i]f 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

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

⁸ As stated in Bent, *supra*.

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)).

Here, the evidence of record reveals that Custodian Ken Mecouch's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Custodian Mecouch's failure to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian violated N.J.S.A. 47:1A-5(h). However, the Complainant's request was not a valid request for government records; therefore, notwithstanding Custodian Mecouch's "deemed" denial, there was no unlawful denial of access. Further, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's unlawful denial of access did 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. Custodian Ken Mecouch did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, Custodian Mecouch'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. Custodian Ken Mecouch failed to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian; therefore he violated N.J.S.A. 47:1A-5(h). *See also* Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), and Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007).
3. The Complainant's request is invalid under OPRA because it fails to reasonably specify identifiable government records and requires the Custodian to conduct research outside the scope of her duties. The request is merely seeking information. As such, Custodian Melissa Bourgeois lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6. *See* 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). *See also* Herron v. Township of Montclair, GRC Complaint No. 2008-46 (April 2009).

4. The evidence of record reveals that Custodian Ken Mecouch's failure to respond in writing within the statutorily mandated time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, Custodian Mecouch's failure to forward the OPRA request to the proper custodian or direct the Complainant to the proper custodian violated N.J.S.A. 47:1A-5(h). However, the Complainant's request was not a valid request for government records; therefore, notwithstanding Custodian Mecouch's "deemed" denial, there was no unlawful denial of access. Further, 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, the Custodian's unlawful denial of access did 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: John E. Stewart, Esq.

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

August 20, 2013