



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER CHALRES RICHMAN
COMMISSIONER LUCILLE DAVY
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DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

September 26, 2007 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2006-163

v.

Town of Secaucus (Hudson County)
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 2007 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 responded in writing on the fifth (5th) business day following receipt of Complainant's August 4, 2006 OPRA request granting access to the requested records, the Custodian has not violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian in the matter before the Council had security concerns regarding the Complainant's use of a hand held scanner to copy the requested records, the Custodian's refusal to permit the Complainant to do so did not violate OPRA. N.J.S.A. 47:1A-5.a. Janet Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007). The Custodian has therefore borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

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 September, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 3, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2006-163

v.

**Town of Secaucus (Hudson County)²
Custodian of Records**

Records Relevant to Complaint: The Complainant sought to review the most recent inspection schedules, including logs, journals, ledgers, registers and inspection books, in which Inspectors of the Building Department or Office of Construction enter information about properties that are to be or have been inspected, and used by the Building Department's Inspectors to plan, organize, coordinate and keep track of inspections.

Request Made: August 4, 2006

Response Made: August 16, 2006

Custodian: Michael Marra, Vincent Prieto³

GRC Complaint Filed: August 16, 2006

Background

August 4, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests review of the records responsive listed above.

August 11, 2006

Custodian's Response to the OPRA request. Custodian's written response to the OPRA request on the fifth (5th) business day after receipt of the OPRA request in which the Custodian requested that the Complainant make an appointment to review the requested records. In a telephone conversation with the Complainant the same day, the Custodian arranges an appointment for August 16, 2006 for the Complainant to review the requested records.

August 16, 2006

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

- Custodian's written response dated August 11, 2006 to the Complainant's OPRA request

¹ No legal representation listed on record.

² Represented by Frank Leanza, Esq., Leanza & Agrapidis (Jersey City, NJ).

³ Michael Marra is the Town Clerk. Vincent Prieto is the Construction Official of the Town of Secaucus.

- Complainant's August 4, 2006 OPRA request with notation dated August 16, 2006 from the Custodian

The Complainant asserts that he visited the office of the Construction Code Official to review the requested records on August 16, 2006. The Complainant further asserts that, while there, the Complainant informed the Construction Official that he wished to make his own copies of the requested records using a portable hand held scanner. The Complainant contends that the Construction Official denied the Complainant's request to make his own copies of the requested records using the portable hand held scanner. The Complainant further contends that the Construction Code Official informed the Complainant that copies of the requested documents must be made by the Building Department and paid for at the Town Clerk's Office and noted same on the Complainant's OPRA request form.

September 12, 2006

Offer of Mediation sent to both parties.

September 12, 2006

Custodian agrees to mediation. The Complainant does not respond to the Offer of Mediation.

September 19, 2006

Request for Statement of Information sent to the Custodian.

September 22, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 4, 2006
- Custodian's response to Complainant's OPRA request dated August 11, 2006
- Complainant's Denial of Access Complaint dated August 16, 2006
- Letter from the Custodian to the GRC dated September 12, 2006
- Signed Agreement to Mediate from Custodian dated September 12, 2006
- Inspection log for the period of January 1, 2006 to June 11, 2006

The Custodian asserts that the Complainant's August 4, 2006 request to review records from the Building Department was granted. The Custodian contends that an appointment was made for August 16, 2006 for the Complainant to review the requested records. The Custodian asserts that at the appointment on August 16, 2006, the Complainant made a verbal request to make copies of the requested records with a hand held scanner. The Custodian contends that the Complainant's request to use a hand held scanner to copy records was denied by the Construction Official because the integrity of the Town's documents must be safeguarded for evidentiary purposes to allow use of such records in legal proceedings. The Custodian asserts that copies of documents can be made for the Complainant by Town employees at the statutory rate.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, 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 provides that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$ 0.75 per page; eleventh page to twentieth page, \$ 0.50 per page; all pages over twenty, \$ 0.25 per page. *The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy...*” (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA also states:

“...[a] *custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy* of a government record ... If 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further 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 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. 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.

OPRA requires that a custodian respond in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007). Additionally, failure to respond to an OPRA request in writing within seven (7) business days results in a deemed denial of access. N.J.S.A. 47:1A-5.i.

In this complaint, the evidence of record shows that the Custodian responded in writing on the fifth (5th) business day following receipt of Complainant’s August 4, 2006 OPRA request, granting access to the requested records and requesting that the Complainant arrange an appointment to review the requested records. Thus, the Custodian has not violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Complainant contends that he should be permitted to use a hand held personal scanner to copy public records. The Custodian alleges that, due to concerns for the safety and integrity of the records, the Custodian cannot allow the Complainant to use his own hand held scanner to copy the requested records.

The issue of allowing citizens to use personal copiers to photocopy government records was first discussed in Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962). In Moore, the defendant refused to allow the plaintiffs to use personal copiers in order to photocopy government records. The Court determined that the plaintiffs were not permitted to copy records on their personal copiers because doing so would risk damaging the records. Specifically, the Court reasoned:

“It is common knowledge that there are many pieces of equipment capable of producing copies. To permit copying with any machine a particular

individual may propose to use, without prior tests as to its capability, would subject the record to the hazard of damage. Although the right to inspect is of vital importance, it is of equal public importance that the original record not be mutilated. Public officials should have the opportunity to select equipment which will assure that the records will not be damaged, and to make suitable arrangements for the availability of such equipment. Hence the result of producing a photocopy can best be obtained by requiring the proper official to furnish such copy at a reasonable cost, rather than by permitting the applicant to make a copy with his own machine.” *Id.* at 30.

Although Moore was decided before the Right-to-Know law became effective, legislators apparently considered the Moore holding when creating the following provision in the Right-to-Know Law in 1963:

“Every citizen of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand and shall also have the right to purchase copies of such records...If the custodian of any such records shall find that there is no risk of damage or mutilation of such records and that it would not be incompatible with the economic and efficient operation of the office and the transaction of public business therein, he may permit any citizen who is seeking to copy more than 100 pages of records to use his own photographic process, approved by the Custodian, upon the payment of a reasonable fee, considering the equipment and the time involved, to be fixed by the Custodian of not less than \$5.00 or more than \$25.00 per day.” N.J.S.A. 47:1A-2.

The Legislature subsequently made substantial amendments to the Right-to-Know law and eventually renamed the statute the Open Public Records Act. In the process of creating OPRA as it currently stands, N.J.S.A. 47:1A-2 was specifically repealed. The Assembly State Government Committee stated in so doing, “[t]he bill repeals N.J.S.A. 47:1A-2 which deals with the right of inspection of public records, how copies are to be provided and the fees that may be charged.” Assembly State Government Committee Statement to Assembly, No. 1309 (March 6, 2000). The provisions replacing N.J.S.A. 47:1A-2 do not mention a citizen’s right to photocopy public records using personal copiers.

Administrative agencies, in general, have broad discretion in selecting the appropriate method and process for fulfilling their statutory responsibilities. In Re Adoption of 2003 Low Income Housing Tax Credit, 369 N.J. Super 2, 44 (App.Div. 2004); In re Request for Solid Waste Util. Cust. Lists, 106 N.J. 508, 519 (1987). Specifically, under OPRA, a custodian has the discretion in developing processes so that he or she can best meet his or her obligations under OPRA. For example, a custodian has the discretion to customize an OPRA request form (so long as the items listed in N.J.S.A. 47:1A-5.f.1-7 are included), to accept, or not accept, requests by e-mail, etc.

A custodian may, in his or her discretion, allow the use of personal photocopiers by requestors depending upon factors including, but not limited to, the specific circumstances of the request, the particular documents requested, the office hours, the available space within the office, the availability of personnel, the availability of appropriate electrical outlets, the consumption of energy, the need to preserve the security of public records or documents and protect them from damage, or other legitimate concerns. A custodian may require that photocopying be done on the agency's photocopier if to allow otherwise would disrupt operations, interfere with the security of public records, or expose records to potential damage.

Therefore, where a custodian believes that the safety, integrity or confidentiality of a document requested pursuant to OPRA may be compromised, or where the custodian has concerns regarding the impact that use of a personal photocopier might have upon any aspect of the operations of the custodian's office, a custodian may, consistent with OPRA, refuse to permit the use of a personal photocopier by a requestor. Janet Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007); see, Moore, supra, 39 N.J. at 30; Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 141 (App. Div. 2006)(A municipality may insist upon using its own diskette, rather than allowing the requesting party to supply the diskette, in order to avoid the possibility that the municipality's computer system may be compromised by any outside party in copying Township Council meeting minutes from Township computers).

Because the Custodian in the matter before the Council had security concerns regarding the Complainant's use of a hand held scanner to copy the requested records, the Custodian's refusal to permit the Complainant to do so did not violate OPRA. N.J.S.A. 47:1A-5.a. The Custodian has therefore borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. Because the Custodian responded in writing on the fifth (5th) business day following receipt of Complainant's August 4, 2006 OPRA request granting access to the requested records, the Custodian has not violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian in the matter before the Council had security concerns regarding the Complainant's use of a hand held scanner to copy the requested records, the Custodian's refusal to permit the Complainant to do so did not violate OPRA. N.J.S.A. 47:1A-5.a. Janet Hascup v. Waldwick Board of Education, GRC Complaint No. 2005-192 (April 2007). The Custodian has therefore borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-6.

Prepared By:

Karyn Gordon
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007