



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
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COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

May 30, 2007 Government Records Council Meeting

Yuan (Kellie) Fang
Complainant

Complaint No. 2006-60

v.

NJ Department of Transportation
Custodian of Record

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 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 OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian’s February 15, 2006 response to Complainant’s OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.
3. The Custodian’s actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the Custodian’s actions do appear to be at least negligent regarding his knowledge of OPRA.

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 30th Day of May, 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: June 4, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

**Yuan (Kellie) Fang¹
Complainant**

GRC Complaint No. 2006-60

v.

**NJ Department of Transportation²
Custodian of Records**

Records Relevant to Complaint:

Department of Transportation (“Department”) discipline action records, including major and minor disciplines, for the calendar year 2003. The records should include:

- 1) Number of total disciplines;
- 2) Each disciplinary action should include:
 - a. Employee’s job category and EEO category (race and gender),
 - b. The reason for discipline,
 - c. Initial discipline recommended, and
 - d. The final discipline posted by hearing officer for the Department.

Request Made: February 15, 2006

Response Made: February 15, 2006

Custodian: Alfred Brenner

GRC Complaint Filed: March 13, 2006

Background

February 15, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above.

February 15, 2006³

Custodian’s first response to the OPRA request, the same day the request was received. The Custodian states that he received the Complainant’s OPRA request and the requested information is not readily available because he will have to contact several units within the Department to obtain the records. The Custodian also states that if the Complainant wishes to have the records mailed, the Custodian will notify the Complainant of the amount due and the records will not be released until payment has been received. The Custodian further states that if the Complainant would like to review the records onsite, the Complainant will be advised who to contact to set up an appointment. Additionally, the Custodian states that if the Complainant has any further

¹ No legal representation listed on record.

² Represented by DAG Albert D. Barnes, on behalf of the NJ Attorney General.

³ The Complainant did not acknowledge receiving the Custodian’s letter dated February 15, 2006.

questions, the Complainant should contact Margaret Fisher at Records & Information Management and listed the telephone number.

February 17, 2006

Custodian's second response to the OPRA request. The Custodian states that the request has been forwarded to DAG Nonee Wagner for handling as part of the pending litigation; therefore the request will be closed as of this date.

March 13, 2006

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

- Complainant's OPRA request dated February 15, 2006,
- Letter from the Custodian to the Complainant dated February 17, 2006, and
- Letter from the Complainant to the GRC not dated.

The Complainant asserts that she requested records on February 15, 2006. The Complainant also asserts that she received a response letter on February 17, 2006 from the Custodian stating that the request has been forwarded to DAG Nonee Wagner for handling as part of the pending litigation; therefore the request will be closed as of this date.

Additionally, the Complainant asserts that the "pending litigation" in which the Custodian refers to is a complaint that the Complainant has filed with the Division on Civil Rights ("DCR") against the Department.

March 16, 2006

Offer of Mediation sent to both parties. The Custodian did not respond to the offer of mediation.

March 20, 2006

The Complainant agrees to mediate this complaint.

March 24, 2006

Request for the Statement of Information sent to the Custodian.

March 31, 2006

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

- Complainant's OPRA records request dated February 15, 2006,
- Letter from the Custodian to the Complainant dated February 15, 2006, and
- Letter from the Custodian to the Complainant dated February 17, 2006 with certified mail receipt.

The Custodian certifies that on February 15, 2006, the Complainant hand delivered her OPRA request to the Department. He also certifies that during that morning he forwarded the request to the OPRA Liaison for Administration to determine if there were any records responsive to the request. The Custodian further certifies that he forwarded the Complainant a letter via certified mail indicating that her request had been received and was under review.

In addition, the Custodian certifies that he was advised by legal counsel that the Complainant's OPRA request directly related to matters pending in litigation, and therefore the Custodian forwarded the request to DAG Nonee Wagner for further handling as part of the pending litigation. The Custodian also certifies that on February 17, 2006, he forwarded the Complainant a letter via certified mail indicating that her request had been forwarded to the DAG and that as of February 17, 2006, the OPRA request would be considered closed.

Further, the Custodian certifies that on February 28, 2006, the Complainant signed the certified mail receipt indicating that she had received the Custodian's letter dated February 17, 2006. The Custodian asserts that he did not receive any further correspondence from the Complainant. The Custodian also certifies that there are no Department records which contain a compilation of the specific information outlined in the Complainant's OPRA request.

Regarding the Complainant's pending litigation, the Custodian certifies that on November 22, 2005, the Complainant filed a Verified Complaint with the DCR in accordance with N.J.A.C. 13:4-3.6 in which the Complainant alleged violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. by the Department of Transportation, "specifically adverse employment actions constituting retaliation and reprisal based on national origin."⁴ The Custodian certifies that the Complainant's verified complaint was served on the Department on January 6, 2006.

Also, the Custodian certifies that since November 22, 2005, the Complainant's verified complaint has been under investigation by the DCR and as such the DCR was to use discovery to obtain pertinent information. However, the Custodian asserts that under N.J.A.C. 13:4-13.2, access to the DCR's investigatory files by the Complainant is not permitted until after a final determination has been issued by the Office of Administrative Law, which the Custodian certifies has not yet occurred.

In the Custodian's legal arguments, he asserts that the Department acted appropriately in forwarding the request to the DAG as the Complainant chose to invoke the assistance of the DCR and therefore "it is inconsistent that [the Complainant] should separately seek comparable information and documentation through an OPRA request."⁵ The Custodian asserts that the referral of the Complainant's request to the DAG in connection with the pending litigation may not be viewed as a denial of access, in which case the GRC would not have jurisdiction.

Despite the pending litigation, the Custodian contends that the requested disciplinary records are personnel records exempt from disclosure pursuant to N.J.S.A. 47:1A-10. Additionally, the Custodian states that Department's regulations also provide that the requested records are not disclosable pursuant to N.J.A.C. 16:1A-1.8(d)(7).

Additionally, the Custodian states that OPRA only requires a response to a request for specific records, not for information. The Custodian notes that pursuant to

⁴ As stated in Custodian's certification.

⁵ As stated in the legal arguments signed by the Attorney General.

MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), a request is invalid when it requires a custodian to conduct research and compile data from various documents. As such, the Custodian contends that the Complainant's OPRA request was properly referred and is subject to denial. The Custodian also asserts that since the relief sought by the Complainant in her GRC complaint cannot be granted, the complaint should be dismissed.

April 7, 2006

Complainant's response to the Custodian's SOI. The Complainant states that in the Custodian's SOI, the Custodian claims that the OPRA request was for information. The Complainant asserts that the OPRA request was for records and that she knows the Department has a compiled book with analysis of Department-wide data such as EEOO/AA and discipline data. She asserts that this book could not have been compiled without original documents and states that the information being sought may be in the book itself.

Additionally, the Complainant addresses the Custodian's argument that the request was for personnel records which are exempt from disclosure pursuant to OPRA. The Complainant contends that the exempt information consists of names and social security numbers and states that she is seeking statistical data. The Complainant also states that if the requested records contain personal information, then the Custodian must redact such information and not use that as reason to deny access to entire records responsive.

Further, the Complainant asserts that the Custodian is attempting to confuse the matter regarding the pending litigation. The Complainant states that her OPRA request is for old records, not the file of her Verified Complaint.

April 17, 2006

Custodian's supplemental submission to the SOI. The Custodian certifies that there is no book or other record maintained by the Department which contains a compilation of the information requested by the Complainant. The Custodian also certifies that research among various Department records, including records not considered government records, would be required in order to provide the requested information. Also, the Custodian cites MAG as support that custodians are not required to conduct research in response to records requests.

June 12, 2006

E-mail from the Custodian to the GRC. The Custodian states that there is a "global" settlement of a number of litigated matters involving the Department and the Complainant, including this complaint as well as another complaint the Complainant filed with the GRC. The Custodian also states that, given the pendency of the settlement process, he suggests that adjudication of this matter be deferred to avoid further time and expense to both parties.

June 13, 2006

E-mail from the GRC to the Complainant. The GRC advises the Complainant that the Custodian has proposed holding off adjudicating this complaint until a settlement is reached regarding the Complainant's pending litigation with the DCR. The GRC also advises the Complainant that only she can make any amendments and if she wishes to make any amendments to this complaint, to please notify the GRC by Jun 19, 2006.

June 15, 2006

E-mail from the Complainant to the GRC. The Complainant states that her complaint with the GRC is OPRA related, and therefore, it is not related to her complaint with the DCR. The Complainant states that the real issue regarding her OPRA request is whether or not the records are public records.

The Complainant attests that it is unknown when the litigation regarding her complaint with the DCR will be settled and whether or not the GRC will include the litigation information with this complaint. The Complainant asserts that the Custodian is trying to unnecessarily close the complaint with the GRC by stating that this matter should be deferred to avoid further time and expense to the parties.

The Complainant states that she agreed to mediation from the beginning, which would have saved time and expense, but the Custodian never agreed. The Complainant also states that she would appreciate a fair judgment from the GRC.

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 further provides that:

“Unless a shorter period of time is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business

days after receiving the request, provided that the record is currently available and not in storage or archived. 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....” 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 also provides that

“the provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

Finally, OPRA provides that:

“Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

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.

In the matter before the Council, the Complainant made an OPRA request for disciplinary action records from the Department for 2003, which records are to include the number of total disciplines, the employee’s job category and EEO category, the reason for discipline, the initial discipline recommended and the final discipline posted by the Department hearing officer.

The Custodian contends that the requested records are personnel records exempt from disclosure under N.J.S.A. 47:1A-10 and the Department's regulation at N.J.A.C. 16:1A-1.8(d)(7).

As disciplinary records of employees within the Department, the requested records are personnel records within the meaning of N.J.S.A. 47:1A-10. They are therefore exempt from disclosure, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension shall be disclosable. N.J.S.A. 47:1A-10. Moreover, data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employees or for the receipt of a public pension, but not including any detailed medical or psychological information, shall be disclosable. *Id.* See also N.J.A.C. 16:1A-1.8(d)(7); N.J.S.A. 47:1A-9.a.

While certain data discussed above would normally be disclosable, the volume of Complainant's request, *i.e.*, records of all major and minor disciplinary actions involving Department employees throughout 2003, is overly broad.

"[U]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt." MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534, 549 (App.Div. 2005). A request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid.

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG's liquor license for various violations. Trying to establish a defense of selective prosecution, MAG filed an OPRA request with the Division, seeking "**all documents or records ...** that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "**all documents or records** evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40 (Emphasis added). MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

"the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations." *Id.* at 540.

The court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The court found it very significant that MAG “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.” *Id.* at 549. Because MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required

“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....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.*

The court therefore found that “MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 550. See also New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App.Div. 2007)(holding that a five-page document listing thirty-eight separate requests all of which included a request for “any and all data” failed to specifically identify the documents sought as required by N.J.S.A. 47:1A-5.f; OPRA did not, therefore, require the custodian to produce the records within seven business days); Bent v. Township of Stafford, 381 N.J. Super. 30 (App.Div. 2005)(finding that a five-part request for the “entire file” of his criminal investigation and “the factual basis underlying documented action and advice to third parties” is not a proper request for public records under OPRA, and the information it seeks is beyond the statutory reach of OPRA); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)(dismissing request for annual costs of liability settlements by the Township for each of five years, including costs for "legal defense of said items[,]” because the requestor failed to identify any specific record in the custodian's possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

Therefore, a request for records must identify particular records within the custodian's possession by name, date, docket number, type of record, or some other specific identifying characteristic in order to be valid under OPRA.

Moreover, the Custodian certifies that no record exists which represents a compilation of the information requested.

OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist. See MAG, supra, 375 N.J. Super. at 546. The Custodian, therefore, has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6.

However, in this case, the Custodian's February 15, 2006 response to Complainant's OPRA request was not adequate because it failed to grant access, deny

access, request an extension or seek clarification of the requested records, within the statutorily mandated seven (7) business days from receipt of said request.⁶ N.J.S.A. 47:1-A.5.i. A written response to an OPRA request which states only that the matter has been forwarded to counsel, and which does not specifically grant access, deny access, request clarification or ask for an extension of time within which to respond is inadequate under OPRA. N.J.S.A. 47:1A-5.i, see Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2004-139 (January 2005). Moreover, the fact that litigation may be pending in another matter involving the parties does not relieve a custodian of the obligation to respond to an OPRA request.

Therefore, because the Custodian's February 15, 2006 response to Complainant's OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], as amended and supplemented, 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.

The Custodian responded to the Complainant's OPRA request within seven (7) business days but failed to grant access, deny access, request clarification, or ask for an extension of time within which to respond to Complainant's OPRA request.

⁶ If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's OPRA request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew that he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a “deemed” denial of the request.

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 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

In light of the legal standards set forth above, and because the Custodian responded to Complainant's OPRA request within the statutorily required seven (7) business day period, and because the Custodian has met the burden of proving that the denial of Complainant's OPRA request was authorized by law, the Custodian's actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian's February 15, 2006 response to Complainant's OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.
3. The Custodian's actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Prepared By:

Karyn Gordon
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007