



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 25, 2007 Government Records Council Meeting

Anne Barron
Complainant

Complaint No. 2006-95

v.

Essex County Superintendent of Registration
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 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. Although the Custodian has certified that the agency does have on file the Essex County's OPRA request form, but holds the right to not utilize such form, the Custodian's staff member violated OPRA pursuant to N.J.S.A. 47:1A-5.f. by not providing the Complainant with the form upon request.
2. The evidence of record does not support 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.

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 April, 2007



Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: April 30, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Anne Barron¹
Complainant**

GRC Complaint No. 2006-95

v.

**Essex County Commissioner of Registration & Superintendent of Elections²
Custodian of Records**

Records Relevant to Complaint:

OPRA request form.

Request Made: May 25, 2006

Response Made: May 25, 2006

Custodian: Carmine Casciano

GRC Complaint Filed: May 25, 2006

Background

May 25, 2006

Telephone call from the Complainant to the Custodian. The Complainant called to request to examine documents concerning the transfer of a voter from one voting district to another. The Complainant asserts that an employee informed her that the office does not have an OPRA request form and that she has to call back on Tuesday to speak with the Superintendent of Elections directly. The Complainant then requested an official OPRA request form so that she could submit a request for the documents being sought.

May 25, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching an e-mail from the Complainant to the GRC dated May 25, 2006.

The Complainant asserts that she requested to see documents concerning the transfer of a voter from one voting district to another. The Complainant asserts that an employee informed her that the office does not have an OPRA request form and that she would have to call back on Tuesday to speak with the Superintendent of Elections directly. The Complainant then requested an official OPRA request form so that she could submit a request for the documents being sought.

¹ No legal representation listed.

² Represented by Jerome J. Convery, Esq. (Old Bridge, NJ).

The Complainant states that she requested the form so that she could submit her request immediately rather than wait until Tuesday. The Complainant also states that her complaint is not about the denial of a record, it is about the denial of the OPRA request form which government agencies are mandated to provide upon request.

The Complainant states that she protests the GRC's advisory opinion designating that only requests on the official form are valid requests because this allows officials to delay providing public documents.

June 2, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediation.

June 12, 2006

Request for Statement of Information sent to the Custodian.

June 15, 2006

Custodian's Statement of Information ("SOI") with a letter from the Custodian to the Complainant dated May 30, 2006.³

The Custodian asserts that on May 25, 2006, the Complainant telephoned the Office of the Commissioner of Registration & Superintendent of Elections regarding information pertaining to the voting records of a specified voter. The Custodian asserts that several staff persons attempted to understand the Complainant's request, but failed to; therefore, the Complainant was informed that the requested records were not easily accessible at the time.

The Custodian asserts that the Complainant then asked for an OPRA form. The Custodian also asserts that her office ordinarily does not require constituents to complete an OPRA form because the requested records are usually easily accessible. However, the Custodian attests that the office does have the OPRA form on file for those requesting it. The Custodian further asserts that her office frequently receives request for public records and has never received a request specifically for an OPRA form.

The Custodian attests that her office maintains its right to not utilize the OPRA form because the requested records are always provided to the requestor at the time of the request, regardless of the request being in person or in writing. The Custodian also indicates that she has attached all of the responsive documents which were provided to the Complainant on May 30, 2006, three (3) business days from the date of the Complainant's first OPRA request on May 25, 2006. The Custodian further indicates that she has also attached the official OPRA form for the County of Essex.

³ The Custodian attached the documents responsive to the request that were sent to the Complainant on May 30, 2006 along with the official OPRA form for the County of Essex, but such documents are not relevant to the Denial of Access Complaint.

Analysis

Whether the Custodian unlawfully denied access to the custodial agency's OPRA request form?

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:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency...” N.J.S.A. 47:1A-5.f.

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.

The Complainant asserts that she requested to see documents concerning the transfer of a voter from one voting district to another. The Complainant asserts that an employee of the agency informed her that the office does not have an OPRA request form and that she would have to call back on Tuesday to speak with the Superintendent of Elections directly. The Complainant then requested an official OPRA request form so that she could submit a request for the documents being sought.

The Complainant states that she requested the form so that she could submit her request immediately rather than wait until Tuesday. The Complainant also states that her complaint is not about the denial of a record, it is about the denial of the OPRA request form which government agencies are mandated to provide upon request.

The Complainant states that she protests the GRC's advisory opinion designating that only requests on the official form are valid requests because this allows officials to delay providing public documents.

The Custodian asserts that on May 25, 2006, the Complainant telephoned the Office of the Commissioner of Registration & Superintendent of Elections regarding information pertaining to the voting records of a specified voter. The Custodian asserts that several staff persons attempted to understand the Complainant's request, but failed to; therefore, the Complainant was informed that the requested records were not easily accessible at the time.

The Custodian asserts that the Complainant then asked for an OPRA form. The Custodian also asserts that her office ordinarily does not require constituents to complete an OPRA form because the requested records are usually easily accessible. However, the Custodian attests that the office does have the OPRA form on file for those requesting it. The Custodian further asserts that her office frequently receives request for public records and has never received a request specifically for an OPRA form.

The Custodian attests that her office maintains its right to not utilize the OPRA form because the requested records are always provided to the requestor at the time of the request, regardless of the request being in person or in writing. The Custodian also indicates that she has attached all of the responsive documents which were provided to the Complainant on May 30, 2006, three (3) business days from the date of the Complainant's first OPRA request on May 25, 2006. The Custodian further indicates that she has also attached the official OPRA form for the County of Essex.

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. OPRA further requires the custodian of a public agency to "adopt a form for the use of any person who requests access to a government record held or controlled by the public agency..." N.J.S.A. 47:1A-5.f. Finally, 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.

Because the Custodian has certified that the agency does have on file an OPRA request form, but holds the right to not utilize such form, the Custodian's staff member violated OPRA pursuant to N.J.S.A. 47:1A-5.f. by not providing the Complainant with the form upon request. The Custodian has therefore failed to provide that the denial of access to Complainant was lawful pursuant to N.J.S.A. 47:1A-6.

Whether the Custodian's violation of N.J.S.A. 47:1A-5.f. rises to the level of a knowing and willful violation of OPRA?

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 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 asserts that the Complainant telephoned the Office of the Commissioner of Registration and Superintendent of Elections regarding information pertaining to the voting records of a specified voter. The Custodian asserts that several staff persons attempted to understand the Complainant’s request, but failed to; therefore, the Complainant was informed that the requested records were not easily accessible at the time. The Custodian asserts that the Complainant then asked for an OPRA form. The Custodian also asserts that her office ordinarily does not require constituents to complete an OPRA form because the requested records are usually easily accessible. However, the Custodian attests that the office does have the OPRA form on file for those requesting it. The Custodian further asserts that her office frequently receives request for public records and has never received a request specifically for an OPRA form. The Custodian contends that her office maintains its right to not utilize the OPRA form because the requested records are always provided to the requestor at the time of the request, regardless of the request being in person or in writing.

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 (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 (App. Div. 1996) at 107).

The evidence of record indicates that the Custodian violated OPRA by failing to provide an OPRA form to the Complainant. The Custodian’s actions in so doing appear to be negligent and heedless, but the evidence of record does not support 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian has certified that the agency does have on file the Essex County’s OPRA request form, but holds the right to not utilize such

form, the Custodian's staff member violated OPRA pursuant to N.J.S.A. 47:1A-5.f. by not providing the Complainant with the form upon request.

2. The evidence of record does not support 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.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007