



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

March 26, 2008 Government Records Council Meeting

Allan Johnson
Complainant

Complaint No. 2007-202

v.

Borough of Oceanport (Monmouth)
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 19, 2008 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 did not violate OPRA because the Custodian responded on the same day as receipt of the Complainant’s OPRA request providing access to some of the requested records, properly requested an extension until August 20, 2007 in writing and certified that all records responsive were disclosed on August 17, 2007, or three (3) days prior to the expiration of the requested extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. The Custodian properly requested an extension of the statutorily mandated seven (7) business days in order to satisfy the Complainant’s August 7, 2007 OPRA request because Councilwoman Kahle was unavailable to disclose any records responsive until August 20, 2007. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July 2006).

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 March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: March 31, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Allan Johnson¹
Complainant**

GRC Complaint No. 2007-202

v.

**Borough of Oceanport²
Custodian of Records**

Records Relevant to Complaint: All incoming and outgoing correspondence, internal and external, including all e-mails belonging to Councilwoman Ellynn Kahle of Oceanport, from July 1, 2007 to the present regarding and/or conducting Borough of Oceanport business with:

1. New Jersey Department of Environmental Protection (“DEP”).
2. DEP employee Greg Schussler.
3. Oceanport Water Watch members.
4. Assemblywoman Jennifer Beck.
5. Other council members.
6. The Monmouth County Board of Health.
7. The Oceanport Board of Health Committee.

Request Made: August 7, 2007

Response Made: August 7, 2007

Custodian: Kimberly Jungfer

GRC Complaint Filed: August 25, 2007

Background

August 7, 2007

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

August 7, 2007

Custodian’s Response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request immediately following receipt of such request. The Custodian provides access to five (5) pages of records located within the Borough records at a cost of \$3.75.

August 9, 2007

¹ No legal representation listed on record.

² Represented by Scott Arnette, Esq. (Shrewsbury, NJ).

Memo from the Custodian to the Complainant. The Custodian states that Councilwoman Kahle is away on vacation, therefore, the Custodian will be unable to obtain any additional records until after Councilwoman Kahle returns on August 20, 2007.

August 17, 2007

The Custodian provides to the Complainant fifty-four (54) additional e-mails in their entirety that were supplied to the Custodian by Councilwoman Kahle.

August 25, 2007

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

- Complainant’s OPRA request dated August 7, 2007.
- Article appearing in *The Link News* the week of August 23, 2007.

The Complainant states that he submitted an OPRA request to the Custodian on August 7, 2007. The Complainant asserts that his request pertained to comments that Councilwoman Kahle made at a public meeting.

The Complainant asserts that upon Councilwoman Kahle’s return from vacation and subsequent receipt of a July 25, 2007 Interim Order from the GRC,³ Councilwoman Kahle provided the Complainant with fifty-four (54) e-mails made and maintained over the requested three (3) week time frame. The Complainant asserts he is confused considering Councilwoman Kahle’s assertion in response to another OPRA request that she did not use e-mail very often.⁴

The Complainant further asserts that in one of the provided e-mails Councilwoman Kahle requests a package to be delivered to her home by a Freeholder. The Complainant states that he has not received a copy of this package from the Custodian.⁵

September 19, 2007

Offer of Mediation sent to both parties. The Complainant declines mediation.⁶

September 25, 2007

³ Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (November 2007).

⁴ The above referenced request was submitted to the Custodian on July 3, 2007 and is the subject of Johnson v. Borough of Oceanport, GRC Complaint No. 2007-200. In that complaint, Councilwoman Kahle stated that the Custodian is copied on all Borough business and that she has recently been conducting Borough business mostly by telephone. This fact is not relevant to the complaint now before the GRC because OPRA provides that each complaint is individually adjudicated within the totality of the circumstances. N.J.S.A. 47:1A-7.e. See Hardwick v. NJ Dept. of Transportation, GRC # 2007-164 (February 2008).

⁵ The GRC is without jurisdiction to determine the content of a record. See Chaka Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record). Additionally, the GRC cannot confirm the existence of the aforementioned package; moreover, any such package would be not responsive as it applies to the Complainant’s August 7, 2007 OPRA request.

⁶ The Custodian returned a signed Agreement to Mediate on September 20, 2007.

Request for the Statement of Information sent to the Custodian.

October 3, 2007

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

- Complainant's OPRA request dated August 7, 2007.
- Memo from the Custodian to the Complainant dated August 9, 2007.

The Custodian certifies that her search for the requested records involved searching Borough records to locate all records responsive. The Custodian certifies that she also sent a memo to Councilwoman Kahle requesting any records responsive to the Complainant's request.

The Custodian states that she received the Complainant's OPRA request on August 7, 2007 and immediately provided all records responsive in the Custodian's possession. The Custodian further states that she sent a memo to Councilwoman Kahle requesting that Councilwoman Kahle provide all records responsive to the Complainant's request by August 13, 2007. The Custodian states that she informed the Complainant in writing on August 9, 2007 that Councilwoman Kahle would be on vacation until August 20, 2007 and that an extension of time would be needed until August 20, 2007 to produce the records requested.

The Custodian states that Councilwoman Kahle supplied the Custodian with the records responsive on August 17, 2007, which she provided to the Complainant on the same date.

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 also 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 ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, the Custodian responded to the Complainant’s OPRA request on the same day as receipt of the Complainant’s OPRA request by providing five (5) pages of records. The Custodian informed the Complainant on August 9, 2007 that Councilwoman Kahle was on vacation and that the Custodian would not be able to fulfill the Complainant’s request until August 20, 2007. The Custodian provided fifty-four (54) records to the Complainant on August 17, 2007.

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. As also prescribed under 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. Further, the Custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.

In the matter before the GRC, the Custodian responded in writing and provided some of the requested records on the same day as receipt of the Complainant’s OPRA request. Subsequently, the Custodian wrote to the Complainant two (2) business days following receipt of the Complainant’s OPRA request to inform the Complainant that an extension until August 20, 2007 was needed because Councilwoman Kahle would not be

available to provide records until that date. The Custodian certified that all records responsive were provided to the Complainant on August 17, 2007 or three (3) days prior to the expiration of the requested extension.

In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July 2006), the GRC held that if the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, she should obtain a written agreement from the Complainant in order to do so. In the complaint now before the Council, the Custodian properly requested an extension of the statutorily mandated seven (7) business days in order to satisfy the Complainant's August 7, 2007 OPRA request because Councilwoman Kahle was unavailable to disclose any records responsive until August 20, 2007. See Parave-Fogg, supra.

Based on the evidence of record, the Custodian did not violate OPRA because the Custodian responded on the same day as receipt of the Complainant's OPRA request providing access to some of the requested records, properly requested an extension until August 20, 2007 in writing and disclosed all records responsive on August 17, 2007, or three (3) days prior to the expiration of the requested extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find:

1. The Custodian did not violate OPRA because the Custodian responded on the same day as receipt of the Complainant's OPRA request providing access to some of the requested records, properly requested an extension until August 20, 2007 in writing and certified that all records responsive were disclosed on August 17, 2007, or three (3) days prior to the expiration of the requested extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. The Custodian properly requested an extension of the statutorily mandated seven (7) business days in order to satisfy the Complainant's August 7, 2007 OPRA request because Councilwoman Kahle was unavailable to disclose any records responsive until August 20, 2007. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-63 (July 2006).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 19, 2008