



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

April 30, 2008 Government Records Council Meeting

Eric Taylor
Complainant

Complaint No. 2007-214

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 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’s failure to grant access, deny access, seek clarification or request an extension of time to the Complainant’s OPRA requests in writing within the statutorily mandated seven (7) business days results in a “deemed” denial 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 (October 2007). Additionally, pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005) and Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian’s verbal request for an extension of time was improper under OPRA because said extension was not requested in writing within the statutorily mandated seven (7) business days.
2. Because the Complainant’s OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).



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 April, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 12, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Eric Taylor¹
Complainant**

GRC Complaint No. 2007-214

v.

**Elizabeth Board of Education (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the signed, written assurance sent by the Elizabeth School District to the federal government, swearing to abide by the published regulations under section 504, as required by 34 C.F.R. 104.5.
2. A copy of the signed, written assurance sent by the Elizabeth School District to the federal government, swearing to abide by the published regulations under the Americans with Disabilities Act, as required by 28 C.F.R. 35.103(a).
3. A copy of the written statement of the method by which the Elizabeth School District contacted members of the disability community to solicit their participation in the self-evaluation under section 504, as required by 34 C.F.R. 104.6(c)(i-iii).
4. A copy of the written statement of the method by which the Elizabeth School District contacted members of the disability community to solicit their participation in the self-evaluation under the Americans with Disabilities Act, as required by 28 C.F.R. 35.105.
5. A copy of the written self-evaluation completed under Section 504 which identifies the policies, practices and procedures which were examined and changed by the Elizabeth School District in light of the requirements of Section 504, pursuant to 34 C.F.R. 104.6(c).
6. A copy of the written self-evaluation completed under the Americans with Disabilities Act which includes a list of the interested representatives of the disability community who were consulted, a description of the areas examined, any problems identified, and a description of any modifications made as a result of the evaluation, pursuant to 28 C.F.R. 35.105.
7. The written plan with timelines to accomplish any modifications under the Americans with Disabilities Act which were identified but which are not yet completed pursuant to 28 C.F.R. 35.105.

¹ Represented by Kevin Mitchell, Esq., of Taylor & Mitchell, L.L.C. (Audubon, NJ).

² Represented by Kelly A. Waters, Esq., of Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P. (Newark, NJ).

Request Made: August 13, 2007
Response Made: October 5, 2007
Custodian: Harold Kennedy
GRC Complaint Filed: September 12, 2007

Background

August 13, 2007

Complainant's Open Public Records Act ("OPRA") requests.³ The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

September 12, 2007

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

- Complainant's OPRA requests dated August 13, 2007
- Certified Mail Return Receipt addressed to Custodian from Complainant postmarked August 15, 2007

The Complainant states that he submitted his OPRA requests on August 13, 2007 and asserts that the Custodian received said requests on August 15, 2007. The Complainant states that on August 22, 2007 he received a telephone call from Joan H. Langer of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP (the Custodian's Counsel) in which Ms. Langer requested an additional two (2) to three (3) business days to comply with the Complainant's requests. The Complainant states that during said telephone call, he agreed to the extension of time. The Complainant states that Ms. Langer advised that she would contact the Complainant again within three (3) business days.

The Complainant also states that on August 31, 2007, he received a telephone call from Ms. Langer's office in which an employee of said office requested a two (2) week extension of time to fulfill the Complainant's OPRA requests. The Complainant states that he informed the employee that he required such request for an extension to be put in writing in order for such extension to be granted. The Complainant states that the employee agreed to provide such request for an extension in writing. However, the Complainant states that to date he has not received the planned extension agreement in writing or any other type of response regarding his OPRA requests.

October 4, 2007

Offer of Mediation sent to both parties.

October 5, 2007

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's OPRA requests on the thirty-sixth (36th) business day following receipt of such requests. The Custodian states that because of the vague and overly broad nature of the Complainant's requests, the District would have to interpret said requests, which would be unreasonably burdensome on the District. The Custodian asks that the

³ The Complainant submitted seven (7) separate OPRA requests for the records enumerated above.
Eric Taylor v. Elizabeth Board of Education (Union), 2007-214 – Findings and Recommendations of the Executive Director

Complainant redefine his requests and identify with specificity the records the Complainant is seeking.

October 9, 2007

Custodian's signed Agreement to Mediate.

October 11, 2007

E-mail from Complainant to GRC. The Complainant declines mediation of this complaint.

October 12, 2007

Request for the Statement of Information sent to the Custodian.

October 19, 2007

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

- Complainant's OPRA requests dated August 13, 2007
- Custodian's response to the Complainant's requests dated October 5, 2007

The Custodian certifies receiving the Complainant's OPRA requests on August 15, 2007. The Custodian certifies that he forwarded said requests to legal counsel because the Custodian was not familiar with Federal C.F.R. sections cited by the Complainant in the OPRA requests. The Custodian states that Joan Langer, Counsel for the Board of Education, obtained an extension of time from the Complainant, but due to a personal emergency she was not able to send the Complainant written confirmation of said extension. The Custodian states that by the time it was determined that said letter had not been provided to the Complainant, the Complainant had filed this Denial of Access Complaint.

The Custodian certifies that he responded to the Complainant's OPRA requests via letter dated October 5, 2007 in which the Custodian sought clarification of the Complainant's vague requests. The Custodian states that one of the Complainant's requests seeks a copy of the Board of Education's written assurance to the federal government as is required by 28 C.F.R. 35.104(a), which the Custodian states is a definitional provision that provides no requirement of a signed written assurance. The Custodian states that to date, the Complainant has not provided clarification of his OPRA requests.

The Custodian contends that he did not unlawfully deny access to the requested records, but rather provided a delayed response to the requests. The Custodian asserts that OPRA provides the custodial agency a basis for seeking clarification to requests that are vague. The Custodian states that in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Appellate Division stated that: "[b]ecause [the request] is so far removed from the type of OPRA request anticipated by the Legislature, we conclude that the related provisions of OPRA, those which require timely response and provide for an award of attorney's fees when such access is denied and litigation is required, have no application here." (citing N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6). The Custodian further asserts that the above

cited court decision states that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” Id.

Additionally, the Custodian states that the court in NJ Builders declared that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” (quoting N.J.S.A. 47:1A-5.g.). “Subsection (g) of N.J.S.A. 47:1A-5 clearly permits outright denial of these requests after an attempt to reach a reasonable and mutually accommodating solution.”

The Custodian asserts that he denied the Complainant’s vague requests because fulfilling such would have substantially disrupted the Board’s operations. The Custodian contends that the Board wished to comply with the Complainant’s requests and as such requested clarification of the requests in an attempt to reach a mutually accommodating solution. The Custodian further states that the Board remains willing to respond to any request made by the Complainant that specifies the documents sought.

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 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 ... If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” 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* ... The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (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. 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.

Additionally, 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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁴ A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Custodian certifies receiving the Complainant’s OPRA requests on August 15, 2007 and forwarding same to legal counsel. The Complainant states that the Custodian’s Counsel requested an extension of time to fulfill said requests via telephone on August 22, 2007, the fifth (5th) business day following the Custodian’s receipt of said requests. The Complainant also states that the Custodian’s Counsel requested an additional extension via telephone on August 31, 2007, but did not request such extension in writing.

⁴ 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.

In Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005), the Custodian provided the Complainant with a written response seeking clarification of the Complainant's request within the statutorily mandated seven (7) business days. The Complainant did not provide any such clarification to the Custodian. The Council held that "[i]n the case of the records that needed clarification, there was no denial of access to records because the Custodian did properly respond to those requests in writing within the statutorily required seven (7) business days, indicating to the Complainant that clarification was necessary but did not receive a response in return from the Complainant."

Additionally, in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian failed to provide the Complainant with a written response either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days because the Custodian was awaiting legal advice on how to appropriately respond to said request. The Council held that "[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond."

In this complaint now before the Council, the Custodian certifies that he provided the Complainant with a written response to the Complainant's requests on October 5, 2007, the thirty-sixth (36th) business day following receipt of such requests, in which the Custodian sought clarification of said requests because the Custodian asserted that said requests were vague and fulfilling such requests would have substantially disrupted the Board's operations. The Custodian also certifies that the Complainant failed to clarify his OPRA requests.

N.J.S.A. 47:1A-5.g. provides that if a request would substantially disrupt agency operations, a custodian may deny access to a request after attempting to reach a reasonable accommodation with the requestor. This provision does not imply that if a request would substantially disrupt agency operations, a custodian is not required to adhere to OPRA's mandated time period to respond to a request. Additionally, the Custodian in this matter failed to state how the Complainant's requests would substantially disrupt the operations of his office.

Therefore in this present matter, the Custodian's failure to grant access, deny access, seek clarification or request an extension of time to the Complainant's OPRA requests in writing within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra. Additionally, pursuant to Cody, supra, and Paff, supra, the Custodian's verbal request for an extension of time was improper under OPRA because said extension was not requested in writing within the statutorily mandated seven (7) business days.

Whether the Complainant's August 13, 2007 OPRA requests were valid under OPRA?"

The New Jersey Superior Court 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 (March 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 (October 2005)⁵, 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."⁶

Additionally, the court in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) cited Mag by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005)."

In the complaint currently before the Council, none of the Complainant's seven (7) OPRA requests include a date or a date range of the records sought and thus are open-ended requests. While some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent.

a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant's requests cites to a definitional regulation rather than a regulation that requires the creation of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, the fact that the Custodian would have to research the federal regulations cited by the Complainant to determine whether said regulations require that a record be created places an undue burden on the Custodian.

Therefore, because the Complainant's OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to grant access, deny access, seek clarification or request an extension of time to the Complainant's OPRA requests in writing within the statutorily mandated seven (7) business days results in a "deemed" denial 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 (October 2007). Additionally, pursuant to Cody v. Middletown Township Public Schools, GRC Complaint No. 2005-98 (December 2005) and Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian's verbal request for an extension of time was improper under OPRA because said extension was not requested in writing within the statutorily mandated seven (7) business days.
2. Because the Complainant's OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008).

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008