



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

April 30, 2008 Government Records Council Meeting

Catherine Schneble
Complainant

Complaint No. 2007-220

v.

NJ Department of Environmental Protection
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. Because the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a JAQ is a DOP record, and that a proper search yielded other records responsive to the Complainant’s August 30, 2007 request, the Custodian unlawfully denied access to the requested records in his September 10, 2007 response to the Complainant’s OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6
2. The evidence of record indicates that although the Custodian’s initial response of no records responsive resulted in a denial of access, the Custodian did eventually provide all records responsive to the Complainant’s request. Additionally, the evidence of record shows that both the Custodian and Ms. Smith misinterpreted the Complainant’s OPRA request to be for only one record: the JAQ. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.



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**

**Catherine Schneble¹
Complainant**

GRC Complaint No. 2007-220

v.

**New Jersey Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Any and all documents pertaining to [the Complainant's] request for a Universal Job Analysis Questionnaire ("JAQ") including the JAQ which was completed on or about August of 2006.³

Request Made: August 30, 2007

Response Made: September 10, 2007

Custodian: Wayne Grennier

GRC Complaint Filed: September 14, 2007

Background

August 30, 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.

September 10, 2007

Michael Celentana's Response to the OPRA request.⁴ Mr. Celentana responds by e-mail to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Mr. Celentana states that the Complainant should contact the New Jersey Department of Personnel ("DOP") because the New Jersey Department of Environmental Protection ("DEP") does not maintain the requested information

September 11, 2007

E-mail from the Complainant to the Custodian. The Complainant states that she requested "any and all" records pertaining to the Complainant's request for a JAQ. The Complainant also asks if there are no letters, e-mails, etc., maintained by DEP regarding the JAQ. The Complainant finally states that she understands that DOP maintains the Complainant's JAQ.

¹ No legal representation listed on record.

² Represented by DAG Mark Collier, on behalf of the NJ Attorney General.

³ The Complainant is requesting records pertaining to her position as an employee of DEP.

⁴ Mr. Celentana was an employee at DEP's OPRA office at the time of this request.

September 11, 2007

The Custodian returns the Complainant's OPRA request to the Complainant. The Custodian's notes on the Complainant's OPRA request that the Complainant was contacted and advised to contact DOP for the records requested. The Custodian further notes that the OPRA request has been closed.

September 14, 2007

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

- Complainant's OPRA request dated August 30, 2007.
- E-mail from Mr. Celentana to the Complainant dated September 10, 2007.
- E-mail from the Complainant to the Custodian dated September 11, 2007.
- Six (6) records retained in the Complainant's personal e-mails.

The Complainant states that she submitted an OPRA request to the Custodian on August 30, 2007. The Complainant states that she received an e-mail from Mr. Celentana on September 10, 2007 stating that DEP does not maintain the requested information and was referred to DOP.

The Complainant disagrees with DEP's response to her OPRA request. The Complainant asserts that the Custodian's notation on the OPRA request form does not state whether or not the request was granted or denied, simply that the request has been closed. The Complainant inquires whether an agency can arbitrarily close an OPRA request.

The Complainant contends that DEP must have records pertaining to her OPRA request for the JAQ. The Complainant encloses e-mails between DEP and the Complainant which the Complainant believes should have been disclosed as part of the response.⁵ Finally, the Complainant asserts that because DEP possesses records responsive to this request, the Custodian should not have directed the Complainant to DOP.

October 16, 2007

Offer of Mediation sent to both parties.

October 22, 2007

The Custodian agrees to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

October 25, 2007

Request for the Statement of Information sent to the Custodian.

⁵ The Complainant attaches e-mails to the Denial of Access complaint that she had in her possession prior to the filing of this OPRA request.

November 2, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of five (5) business days to submit the Statement of Information.

November 2, 2007

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until November 8, 2007 to file the Statement of Information.

November 8, 2007

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

- Complainant's OPRA request dated August 30, 2007.
- Twelve (12) pages of records disclosed to the Complainant.

The Custodian certifies that his search for the requested records involved consulting DEP's Human Resources computer program or database to find records responsive to this request.

The Custodian also certifies that no documents responsive to the Complainant's request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian states that he received the Complainant's request for any and all documents pertaining to the Complainant's request for a JAQ, as well as the JAQ itself, on August 30, 2007. The Custodian asserts that he searched DEP's files, but that he mistakenly determined that no records responsive to the Complainant's request existed within DEP files because he was aware that a JAQ is a DOP record. The Custodian states that the Complainant was subsequently directed to DOP to obtain the requested record.

The Custodian states that after receipt of the Complainant's Denial of Access complaint, which included e-mails between the DEP and the Complainant pertaining to the JAQ, the Custodian re-investigated DEP's files and located records responsive to the Complainant's request, including formal letters and e-mails.⁶ The Custodian states that these records are being disclosed with the Custodian's simultaneous submission of the Statement of Information to the Complainant.

The Custodian further asserts that DEP has provided all records responsive in its possession, except the JAQ itself, because DEP does not make, maintain or keep JAQs on file pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that JAQs are questionnaires administered by DOP.

Finally, the Custodian contends that DEP made a mistake in the Custodian's initial response by stating that no records pertaining to the Complainant's request for a

⁶ The formal letters are between DEP's Human Resource Manager and a DOP Classification Management Unit Manager.
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JAQ, including the JAQ itself, existed. The Custodian further states that all records responsive have been released with the exception of the JAQ, which is not made, maintained or kept on file at DEP.

February 28, 2008

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification addressing the following:

1. What document retention methods (i.e. computer databases, printed material contained in physical files, etc.) were searched to locate records responsive to the Complainant's request?
2. Was the second investigation conducted in a similar manner as the initial investigation was performed?

March 5, 2008

Legal Certifications from the Custodian's Counsel to the GRC. The Custodian's Counsel states that two Legal Certifications are enclosed from DEP officials concerning DEP's handling of the Complainant's August 30, 2007 request. The Custodian's Counsel states that the Certifications reflect that DEP initially misunderstood the Complainant's OPRA request as one for records which are only available through DOP and therefore DEP responded to the Complainant without conducting a thorough search. The Custodian's Counsel states that DEP immediately revisited the Complainant's request after realizing that the scope of the initial investigation was too narrow and was able to locate and provide responsive records to the Complainant.

Certification of the Custodian

The Custodian certifies that he received the Complainant's OPRA request on August 30, 2007. The Custodian further certifies that he made the determination that the Office of Management & Budget ("OMB") in DEP could possibly possess records responsive to the Complainant's OPRA request. The Custodian certifies that OMB responded to the Custodian on September 6, 2007 stating that the Complainant should submit her request to DOP. The Custodian certifies that he responded in writing to the Complainant on September 10, 2007 stating that the request was closed and recommending that the Complainant make an OPRA request to DOP.

The Custodian certifies that, upon receipt of the Complainant's Denial of Access complaint, the Custodian's Counsel advised the Custodian to revisit the Complainant's OPRA request with OMB in order to take a broader look at the request, notwithstanding the fact that the JAQ was a record generated at DOP. The Custodian certifies that he contacted OMB, which was able to locate and provide records responsive to the Complainant's OPRA request: those records were submitted to the Complainant as part of the Custodian's SOI.

Certification of Mary F. Smith

Ms. Smith certifies that she is the manager of the Human Resources Operations of the OMB within DEP and that she handled the Complainant's OPRA request directly. Ms. Smith certifies that she determined the Complainant's request to be seeking the JAQ form itself, which is a DOP record, and that she subsequently responded to the Custodian that no records responsive existed and the Complainant should make a request to DOP.

Ms. Smith further certifies that, upon the advice of the Custodian and Custodian's Counsel regarding this complaint, Ms. Smith conducted a physical search of all of the available files, as well as any e-mails located within DEP's archives, for records responsive to the Complainant's OPRA request. Finally, Ms. Smith certifies that in the process of performing this broader search, she was able to locate records which were responsive to the Complainant's request and that she provided such records to the Custodian for disclosure.

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 ..." 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. 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 initially responded to the Complainant’s August 30, 2007 OPRA request by stating that no records responsive existed. The Complainant, however, submitted e-mails which are responsive to this request with the Denial of Access Complaint. The Custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the Custodian again searched through DEP files and this time located records responsive to this request. Both the Custodian and Ms. Smith of OMB certify that DEP’s initial failure to produce the records responsive was a result of the inadequate search performed because the Custodian and Ms. Smith assumed the request sought a DOP record.

The Complainant requested “any and all documents,” which the GRC has previously determined to be an overly broad request in certain cases. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (App. Div. 2005). However, the Complainant did include two specific factors which qualified her OPRA request: the subject (the Complainant’s request for a JAQ) and the month (August 2006). In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request.

Because the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a JAQ is a DOP record, and that a proper search yielded other records responsive to the Complainant’s August 30, 2007 request, the Custodian unlawfully denied access to the requested records in his September 10, 2007 response to the Complainant’s OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether the Custodian’s failure to initially provide the records responsive to the request rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If 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.

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 although the Custodian’s initial response of no records responsive resulted in a denial of access, the Custodian did eventually provide all records responsive to the Complainant’s request. Additionally, the evidence of record shows that both the Custodian and Ms. Smith misinterpreted the Complainant’s OPRA request to be for only one record: the JAQ. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a Job Analysis Questionnaire is a New Jersey Department of Personnel record, and that a proper search yielded other records responsive to the Complainant’s August 30, 2007 request, the Custodian unlawfully denied access to the

requested records in his September 10, 2007 response to the Complainant's OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6

2. The evidence of record indicates that although the Custodian's initial response of no records responsive resulted in a denial of access, the Custodian did eventually provide all records responsive to the Complainant's request. Additionally, the evidence of record shows that both the Custodian and Ms. Smith misinterpreted the Complainant's OPRA request to be for only one record: the Job Analysis Questionair. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
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Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008