



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

December 18, 2008 Government Records Council Meeting

James F. Doyle
Complainant

Complaint No. 2007-312

v.

City of Hoboken (Essex)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council (“Council”) considered the December 10, 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 Custodian did not provide the Complainant with a written response to his OPRA request until the forty-sixth (46th) business day after receipt of same, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian’s failure to respond within seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request 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).
2. Because the Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA request available to the Complainant, the Custodian has provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1.
3. The Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA request available to the Complainant. The Custodian has therefore provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1. 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 failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or



requesting an extension of time within the statutorily mandated seven (7) business days appears negligent and heedless since he is vested with the legal responsibility of providing a correct and lawful basis for denying access to government records within seven (7) business days as mandated by statute N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

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 18th Day of December, 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, Secretary
Government Records Council

Decision Distribution Date: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**James F. Doyle¹
Complainant**

GRC Complaint No. 2007-312

v.

**City of Hoboken (Essex)²
Custodian of Records**

Records Relevant to Complaint:

1. All documents concerning the legally enforceable requirements of the Toll Brothers open space at the Shipyard Development Project, the waterfront public spaces, and the requirements for the Toll Brothers predecessors.
2. All documents which detail the specifics of the work the City of Hoboken will perform at the Maxwell Project with the estimated funds provided by the Department of Transportation.

Request Made: October 19, 2007

Response Made: December 26, 2007

Custodian: Michael Mastropasqua

GRC Complaint Filed: December 21, 2007³

Background

October 19, 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.

December 21, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated October 19, 2007. The Complainant states that he filed an OPRA request on October 19, 2007 with the City of Hoboken. The Complainant states that on November 2, 2007 he visited Hoboken City Hall to check the status of his OPRA request. The Complainant alleges that he was told that the records responsive to his request have not been compiled. The Complainant states that on November 26, 2007 he visited Hoboken City Hall to check the status of his OPRA request. The Complainant alleges that he was told that the records responsive have not yet been compiled. The Complainant states that on December 7, 2007 he visited Hoboken City Hall to check the status of his OPRA request. The Complainant alleges

¹No legal representation listed on record.

²Represented by Steven W. Kleinman, Esq. (Hoboken, NJ).

³The GRC received the Denial of Access Complaint on said date.

that he was told that the office that possessed the records necessary to fulfill the Complainant's OPRA request needed another copy of the request and to return on December 12, 2007. The Complainant states that on December 14, 2007 he visited Hoboken City Hall to check the status of his OPRA request. The Complainant alleges that he was told that the responsive records have not been compiled and to return on December 19, 2007. The Complainant states that on December 19, 2007 he visited Hoboken City Hall to check the status of his OPRA request. The Complainant alleges that he was told that it is not completed. The Complainant further states that despite five (5) visits to Hoboken City Hall to inquire about the status of his OPRA request, he did not receive a written response from the Custodian.

December 26, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the forty-sixth (46th) business day following receipt of such request. The Custodian states that access to the requested records is denied pursuant to MAG Entertainment, LLC. V. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App.Div. 2005), because the Complainant's OPRA request is overly broad and does not identify any specific public record. The Custodian also states that the office is not in a position to determine which requirements are "legally enforceable."

The Custodian certifies that he does not possess any records responsive to Item No. 1 of the Complainant's OPRA request. The Custodian states that he has identified two (2) records that are responsive to Item No. 2 of the Complainant's OPRA request. The Custodian states that those records will be made available for the Complainant's review free of charge. The Custodian also states that given the non-standard size of the records, if the Complainant would like a copy of the above referenced records, the records would have to be copied by an outside vendor and the Complainant will be responsible for the duplication cost charged by the outside vendor.

January 7, 2008

Offer of Mediation sent to both parties.

January 8, 2008

Both the Custodian and Complainant agree to mediation.

January 28, 2008⁴

Request for the Statement of Information sent to the Custodian.

January 30, 2008

Letter from the Complainant to the Custodian. The Complainant asserts that the Custodian's statement that the Complainant's OPRA request was overly broad is itself overbroad. The Complainant argues that MAG does not stand for the proposition asserted by the Custodian. The Complainant argues that MAG stands for the proposition that OPRA cannot be used as an alternative means of discovery. The Complainant argues that the Appellate Division ruled in MAG that OPRA does not require records custodians to conduct research among records for a requestor or to correlate data from various government records in the custodian's possession.

⁴ The date of return to the GRC from Mediation is unclear.
James F. Doyle v. City of Hoboken (Essex), 2007-312- Findings and Recommendations of the Executive Director

The Complainant argues that the Custodian's December 26, 2007 letter fails to address Complainant's OPRA request in its entirety. The Complainant states that he accepts the Custodian's assertion that there are no records responsive to Item No. 1 and withdraws his complaint as to Item No. 1. The Complainant also states that he is in the process of making an appointment to review the records that the Custodian has indicated are responsive to Item No. 2.

The Complainant states that he is willing to withdraw his Denial of Access Complaint once he has had the opportunity to review the records responsive to Item No. 2 of the OPRA request. The Complainant states that he objects to the Custodian's assertion that the Complainant's OPRA request was overly broad.

The Complainant asserts that his use of the term "legally enforceable" clarifies his OPRA request. The Complainant states that it is clear from the way in which he uses the term that he only wants the requirements that are mandatory. The Complainant argues that the Custodian would not have to conduct research to fulfill the OPRA request. The Complainant further argues that a reasonable time period is implied by his specific reference to the Maxell project, which was begun in 2002. Lastly, the Complainant argues that pursuant to MAG, bad recordkeeping does not relieve the Custodian of the responsibility to disclose the records in his possession.

February 15, 2008

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

- The Complainant's OPRA request dated October 19, 2007
- Letter from the Custodian to the Complainant dated December 26, 2007
- Appellate Division decision in Mason v. Hoboken, Docket No. A-0508-06T5 (Decided January 29, 2008)
- Letter from the Complainant to the Custodian dated January 29, 2008

The Custodian argues that the Complainant's OPRA request is invalid because it lacks specificity and requires the Custodian to conduct research. The Custodian further argues that pursuant to Mason v. Hoboken, Docket No. A-0508-06T5 (Decided January 29, 2008), which contains facts similar to the complaint at bar, the Custodian was under no statutory obligation to provide a response to an OPRA request which did not specify particular records. The Custodian alleges that, as in Mason, any delay in the Custodian's response can be attributed to the inappropriate nature of the Complainant's OPRA request. The Custodian certifies that the Complainant has been provided records where there was no legal obligation to do so. The Custodian finally states that the Complainant's Denial of Access Complaint is baseless and must be dismissed.

February 27, 2008

The Complainant's response to the Custodian's SOI. The Complainant argues that pursuant to N.J.S.A. 47:1A-5.i., the Custodian's failure to respond to the Complainant's OPRA request within seven (7) business days of receipt of the request constitutes a deemed denial. The Complainant further argues that the burden of proof is on the Custodian to prove that the denial of access was lawful. The Complainant asserts

that it was not the New Jersey Legislature's intent to require a requestor to identify with a great deal of specificity each record sought.

August 4, 2008

Telephone conversation between the GRC and the Complainant. The Complainant states that he has reviewed the documents identified by the Custodian as being responsive to the Complainant's OPRA in February 2008.⁵

August 4, 2008

Letter from the Custodian to the GRC. The Custodian indicates that to his knowledge, the records requested in Item No. 2 of the OPRA request were made available to the Complainant for review on or about January 30, 2008.⁶

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:

"A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor[e] on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5.g.

OPRA states:

⁵ The Complainant stated that he will provide the GRC with an e-mail verifying his review of the records identified as responsive to Item No. 2. To date the Complainant has not supplied the GRC with the promised e-mail.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

“Unless a shorter time period 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, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor.” 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.

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. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request 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).

Because the Custodian did not provide the Complainant with a written response to his OPRA request until the forty-sixth (46th) business day after receipt of same, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian’s failure to respond within seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request 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).

Because the Complainant withdrew in writing on January 30, 2008 Item No. 1 of from his Denial of Access Complaint, the GRC will not adjudicate this item. As to Item No. 2, the evidence of record indicates that the Custodian initially denied Item No. 2 of the Complainant’s OPRA request on the grounds that the Complainant’s request was

overly broad and unclear. However, the Custodian subsequently identified records responsive to the Complainant's OPRA request. Therefore, the applicability of the Custodian's contention regarding the broad and unclear nature of the request will not be adjudicated herein. The Custodian stated that the records identified as being responsive to the Complainant's OPRA request were made available for review on or about January 30, 2008 and the Complainant verbally represented to the GRC that he reviewed the records responsive to request Item No. 2 in February 2008.

Because the Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA request available to the Complainant, the Custodian has, therefore, provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1.

Whether the Custodian's delay in access to the requested records 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, 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, 107 (App. Div. 1996).

The Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA

request available to the Complainant. The Custodian has therefore provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1. 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 failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days appears negligent and heedless since he is vested with the legal responsibility of providing a correct and lawful basis for denying access to government records within seven (7) business days as mandated by 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 that:

1. Because the Custodian did not provide the Complainant with a written response to his OPRA request until the forty-sixth (46th) business day after receipt of same, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian's failure to respond within seven (7) business days results in a "deemed" denial of the Complainant's OPRA request 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).
2. Because the Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA request available to the Complainant, the Custodian has provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1.
3. The Complainant withdrew Item No. 1 of his complaint and the Custodian has certified that he made the records identified as responsive to Item No. 2 of the OPRA request available to the Complainant. The Custodian has therefore provided access to all records responsive to the request as required by N.J.S.A. 47:1A-1. 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days appears negligent and heedless since he is vested with the legal responsibility of providing a correct and lawful basis for denying access to government records within seven (7) business days as mandated by statute N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008