



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

November 28, 2007 Government Records Council Meeting

Michael Della Vella
Complainant

Complaint No. 2007-51

v.

City of Wildwood (Cape May)
Custodian of Record

At the November 28, 2007 public meeting, the Government Records Council (“Council”) considered the November 21, 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. Because the Custodian mailed his response to the Complainant’s December 29, 2006 OPRA request on January 16, 2007 or 10 (ten) business days following receipt of such request, the Custodian’s failure to respond in writing to the 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. The Complainant’s December 29, 2006 OPRA request is overly broad and does not seek specific identifiable records. It is therefore an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30 (App. Div. 2005).
3. Although the Custodian failed to respond in writing to the Complainant within the statutorily mandated seven (7) business days, the evidence of record does not support a conclusion that the Custodian’s denial of access was knowing and willful. 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 deemed 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 28th Day of November, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: November 29, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 28, 2007 Council Meeting**

**Michael L. Della Vella¹
Complainant**

GRC Complaint No. 2007-51

v.

**City of Wildwood²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all written records concerning Resolution 241-6-06 declaring an emergency situation on Poplar Avenue between Atlantic and Ocean Avenues due to the poor condition of sewer piping and requiring the City Engineer take immediate steps to replace the sewer in that area of Poplar Avenue.
2. Any documentation from City Engineer that provided the impetus to declare an emergency situation.
3. Any and all actions taken after passage of this resolution.

Request Made: December 29, 2006

Response Made: January 16, 2007³

Custodian: Chris Woods

GRC Complaint Filed: January 30, 2007

Background

December 29, 2006

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.

January 16, 2007

Custodian's response to the Complainant dated January 12, 2007 (with attachments). The Custodian responds to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states that no written files exist on how the sewer problem came to light because the problem was unanticipated. The Custodian informs the Complainant that the Joint Construction Office holds all of the information on condominiums being constructed on Poplar Avenue and provides a telephone number.

¹No legal representation listed on record.

²No legal representation listed on record.

³ Custodian includes a postmarked envelope dated January 16, 2007 in a letter to the GRC on February 8, 2007. The envelope was returned as undeliverable on January 21, 2007.

The Custodian finally states that engineering charges are attached and to contact the Custodian if the Complainant requires additional assistance.

January 21, 2007

Returned envelope to the Custodian marked “Not Deliverable as Addressed,” postmarked January 16, 2007. The Custodian states that the post office returned his response to the Complainant dated January 12, 2007.

January 30, 2007

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

- Complainant’s OPRA request dated December 29, 2006.
- Resolution No. 241-6-06.

The Complainant states that he submitted a request to the Custodian on December 29, 2006. The Complainant further states that he has not received a response from the Custodian.

February 8, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

February 8, 2007

Letter from the Custodian to the GRC attaching:

- Memo from Custodian to the Complainant dated January 12, 2007 (with attachments).
- Envelope marked “Not Deliverable as Addressed,” postmarked January 16, 2007.

The Custodian asserts that he left a message for the Complainant via telephone on January 9, 2007 and then mailed the records responsive on January 16, 2007 after the Complainant failed to return the call. The Custodian further states that the envelope in which the Custodian mailed the records to the Complainant was returned to him marked “Not Deliverable as Addressed” and had the word “moved” written on it.

The Custodian contends that this is the first piece of mail that has come back undeliverable. The Custodian also contends that the Complainant never returned his telephone call, which was unusual in regards to this particular requestor. The Custodian finally asserts that based on the previous facts and information from one of the Complainant’s neighbors that the Complainant moved, the Custodian concluded that the Complainant must have left the area and was dropping his OPRA request.

February 20, 2007

Request for the Statement of Information sent to the Custodian.

February 22, 2007

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

- Complainant's OPRA request dated December 29, 2006.
- Memo from the Custodian to the Complainant dated January 12, 2007 (with attachments).
- Envelope marked "Not Deliverable as Addressed," postmarked January 16, 2007.

The Custodian states that he received the Complainant's request on December 29, 2007. The Custodian asserts that he telephoned the Complainant on January 9, 2007 and left a message stating that the Custodian had completed the Complainant's request and would wait to hear from the Complainant as to when he would be arriving to retrieve the records responsive.

The Custodian states that he wrote a response to the Complainant's OPRA request on January 12, 2007 advising the Complainant that there were no written records regarding how the emergency situation came about because it came about suddenly. The Custodian also states that he attached a three (3) page record concerning the costs of the project. The Custodian states that after mailing the memo and record on January 16, 2007, the letter was returned to him by the Post Office on January 21, 2007, at which time he was also informed by one of the Complainant's neighbors that the Complainant had moved away.

The Custodian asserts that he attempted to provide the records responsive in a timely manner. The Custodian further asserts that he provided the Resolution, letter and proposal dated June 16, 2006 and created a third record entailing how the emergency situation came about. The Custodian also contends that the Complainant's request is overbroad and that the Complainant is attempting to have the Custodian do research. The Custodian asserts that all records that he believed were responsive to this request were provided and that a more specific OPRA request could be filed to specify other records.

The Custodian states that in MAG Entertainment v Alcohol Beverage Control, 375 N.J. Super. 534, (App. Div. 2005), the court held that the requestor's OPRA request did not identify specific government records, requiring the custodian to do research and investigation and that ultimately the requestor's OPRA request was a "broad-based demand for research and analysis, decidedly outside the statutory limit." The Custodian asserts that the Complainant's December 29, 2006 OPRA request displays all three elements set forth by the court in MAG.

Finally, the Custodian asserts that he went above and beyond his duty as a custodian by creating a record and not charging the Complainant copying fees. The Custodian asserts that the GRC should rule against the Complainant and order him to pay \$3.00 for the information provided.

March 2, 2007

The Complainant's Response to the Custodian's SOI. The Complainant questions why the Custodian would send the records after leaving a message on January 9, 2007 stating that the Custodian would wait to hear back from the Complainant. The Complainant further asserts that his house was never put up for sale and finds it

unreasonable that the Custodian would not wait to speak with the Complainant before sending out the records.

The Complainant questions how, if the Custodian left a message on January 9, 2007, the memo he prepared could say January 12, 2007 and be mailed on January 16, 2007. The Complainant further questions why the Custodian has not yet submitted a signature to the SOI as required by the GRC.

The Complainant states that the Custodian's arguments in the Statement of Information are not credible. The Complainant asserts that the Custodian could not have attempted to provide the records in a timely manner given the discrepancies in dates provided for the telephone call (January 9, 2007), the memo (January 12, 2007) and the mailing which was never received by the Complainant (January 16, 2007). The Complainant further asserts that the reason why the Custodian could not have had all records responsive on January 9, 2007 is that the memo was not composed until January 12, 2007. The Complainant further points out that the three (3) page record attached to the Custodian's SOI has a fax date of February 8, 2007 on it, which further contradicts the Custodian's assertion that all records responsive were prepared on January 9, 2007. The Complainant also points out that February 8, 2007 was the same day the Custodian was notified of the filing of the Denial of Access complaint.

The Complainant asserts that the Custodian has provided no information as to whether the emergency was corrected, i.e., invoices and payments made by the City of Wildwood. The Complainant asserts that it is his understanding that "all action" is action by anyone performing work at the site of the emergency on Poplar Avenue. The Complainant also asserts that he believes his December 29, 2006 OPRA request was specific as to the records sought. The Complainant asserts that the Custodian was present when the Complainant filled out and submitted the OPRA request and voiced no concern over it at that time.

The Complainant finally asserts that he is still awaiting more records responsive to this request since he has yet to receive any records relevant to the work performed to correct the emergency situation stated in Resolution 241-6-06.

March 5, 2007

The Custodian returns the signature page of the Statement of Information to the GRC.

March 6, 2007

Letter from the Custodian to the GRC.⁴ The Custodian states that he does not wish to respond to the Complainant's March 2, 2007 response, but would just like to reiterate points outlined in the SOI.

The Custodian asserts that he attempted to provide all records to the Complainant in a timely manner. The Custodian also asserts that the Custodian's request was broad

⁴ Custodian attached the memo dated January 12, 2007 and three (3) page record, which excludes the faxed date of February 8, 2007.

and unclear pursuant to MAG. The Custodian asserts that he went above and beyond his duty as a custodian.

The Custodian contends that the Complainant's dispute of the record dated February 8, 2007 was in fact made on that day only after the Custodian could not locate the original letter sent to the Complainant. The Custodian asserts that the original record was provided to the Complainant with the memo dated January 12, 2007 and are attached to this correspondence as proof that they existed prior to February 8, 2007.

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.

Based on the evidence of record, the Custodian’s written response to the Complainant’s OPRA request occurred ten (10) business days following receipt of the Complainant’s request.

Therefore, the Custodian’s failure to respond in writing to the 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).

Additionally, 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 (App. Div. 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 (App. Div. 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 *Id.*

In this complaint, the Custodian asserts that the Complainant’s request is broad and unclear pursuant to the court’s holding in MAG, *supra*. Items No. 1 and 2 of the Complainant’s OPRA request seek “any and all” records or documentation pertaining to certain sewer repairs conducted by the City of Wildwood. The request does not identify particular government records, as required by the holdings of MAG and Bent. The

⁵ Affirming the Council’s decision in Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent.

Custodian would be required to conduct research in order to ascertain records responsive to the Complainant's requests for items No. 1 and 2, which is specifically prohibited by the court. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (App. Div. 2005).

Additionally, request item No. 3 does not seek "records" at all, but rather seeks "actions" taken following the passage of Resolution 241-6-06. This portion of the request clearly does not relate to any identifiable government record, *i.e.*, invoices, work plans, contracts, minutes etc. The Complainant's request item No. 3 is a request for information rather than records, which is similarly invalid pursuant to the court's holdings in MAG, *supra*, and Bent, *supra*.

The Complainant's December 29, 2006 OPRA request is overly broad and does not seek specific identifiable records. It is therefore an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30 (App. Div. 2005).

Whether the Custodian's unlawful denial of 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 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder 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).

Although the Custodian failed to respond in writing to the Complainant within the statutorily mandated seven (7) business days, the evidence of record does not support a conclusion that the Custodian's denial of access was knowing and willful. Moreover, the Complainant's December 29, 2006, request is an invalid OPRA request because it is overly broad and does not seek specific identifiable records. 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 deemed 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 Custodian mailed his response to the Complainant's December 29, 2006 OPRA request on January 16, 2007 or 10 (ten) business days following receipt of such request, the Custodian's failure to respond in writing to the 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (August 2007).
2. The Complainant's December 29, 2006 OPRA request is overly broad and does not seek specific identifiable records. It is therefore an invalid OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super 30 (App. Div. 2005).
3. Although the Custodian failed to respond in writing to the Complainant within the statutorily mandated seven (7) business days, the evidence of record does not support a conclusion that the Custodian's denial of access was knowing and willful. 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 deemed 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:

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Approved By:

Catherine Starghill, Esq.
Executive Director

November 21, 2007