



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 31, 2007 Government Records Council Meeting

Frank D'Amore, Sr.
Complainant

Complaint No. 2007-93

v.

Borough of North Plainfield (Somerset)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council ("Council") considered the October 24, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council adopted the entirety of said findings and recommendations by majority vote. The Council, therefore, finds that:

1. Because the Custodian failed to set forth a lawful reason for the denial of access to the Complainant's October 2, 2006 and October 23, 2006 OPRA requests, the Custodian unlawfully denied access to the requested records in the October 2, 2006 and October 23, 2006 requests and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proving that the denial of access to the Complainant's February 26, 2007 OPRA request was lawful since no records were responsive to the Complainant's February 26, 2007 OPRA request and the Custodian certifies that she has never received or maintained the requested records.
3. Because the Custodian responded in a timely manner to all three requests, was relying on advice from the Borough Zoning Officer, and provided a lawful response to the Complainant's February 26, 2007 OPRA request, 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 she 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 31st Day of October, 2007

David Fleisher, Secretary
Government Records Council

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

Janice Kovach
Government Records Council

Decision Distribution Date: November 15, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**Frank N. D'Amore Sr.¹
Complainant**

GRC Complaint No. 2007-93

v.

**Borough of North Plainfield (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of summonses issued to the owner of 239 Brook Ave for overcrowding and/or illegal housing on October 4, 2005 and April 10, 2006 and the court dispositions thereof.

Request Made: October 2, 2006; October 23, 2006; February 26, 2007³

Response Made: October 2, 2006; October 23, 2006; March 1, 2007

Custodian: Gloria Pflueger

GRC Complaint Filed: March 26, 2007

Background

October 2, 2006

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 2, 2006

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on same day as receipt of such request. The Custodian states that access to the requested records is denied because the hearings involving these summonses are still pending.

October 23, 2006

Complainant's second (2nd) OPRA request on an official request form.

October 23, 2006

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on same day as receipt of such request. The Custodian states that access to the requested records is denied because the Borough Zoning Officer advised that the hearings involving these summonses are still pending.

February 26, 2007

¹No representation listed on record.

²Represented by Eric Martin Bernstein, Esq. (Warren, NJ).

³Complainant's three (3) separate OPRA requests are for identical records.

Complainant's third (3rd) Open Public Records Act request on an official request form.

February 26, 2007

Custodian's response to the third (3rd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the Borough Zoning Officer had advised the Custodian that no summonses were issued for either October 4, 2005 or April 10, 2006.

March 26, 2007

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

- Complainant's OPRA request dated October 23, 2006.
- Note from the Custodian to the Complainant annotated on the Complainant's OPRA request.
- Complainant's OPRA request dated February 26, 2007.
- Note dated February 26, 2007 from the Custodian to the Complainant annotated on the Complainant's OPRA request.⁴

The Complainant states that he submitted OPRA requests on October 2, 2006 and October 23, 2006 for the records listed above. The Complainant states that the Custodian denied these requests because the Borough Zoning Officer had advised that the hearings involving these summonses were still pending in the municipal court. The Complainant states that he submitted a third OPRA request on February 26, 2007. The Complainant states that the Custodian denied his request because the Borough Zoning Officer had advised that no summonses were issued for the dates contained in the Complainant's request.

The Complainant asserts that the denial he received for the October 2, 2006 and October 23, 2006 OPRA requests contradicts the information that the Complainant received in response to his February 26, 2007 OPRA request. The Complainant further asserts that this conflict is evidence of a deliberate attempt to deny access to the records responsive to this request.

April 10, 2007

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

April 18, 2007

Request for the Statement of Information sent to the Custodian.

⁴ Although the notation is dated February 26, 2007, the Custodian's response was returned to the Complainant on March 1, 2007.

April 19, 2007

Letter from Custodian's Counsel to the GRC. The Custodian's Counsel states that the Borough of North Plainfield is not the Custodian of Records for the records responsive to this request. The Custodian's Counsel states that the Municipal Court Administrator is the records custodian for summonses and that because the OPRA requests were not properly addressed to the Court Administrator, the requests should not have been handled by the Custodian.

The Custodian's Counsel further states that when the Custodian forwarded the Complainant's Denial of Access Complaint to him on April 10, 2007, the Custodian's Counsel contacted the Court Administrator and obtained all requested records that pertained to 239 Brook Avenue. The Custodian's Counsel also states that these records were provided to the Complainant on April 17, 2007.

April 26, 2007

Letter from the GRC to the Custodian. The GRC advises the Custodian that the letter received from the Custodian's Counsel insufficiently meets the requirements of the Statement of Information. The GRC requests the Custodian to complete the Statement of Information in its entirety and submit it no later than close of business on May 2, 2007.

May 1, 2007

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

- Complainant's OPRA request dated October 2, 2006 with Custodian's response on same date.
- Complainant's OPRA request dated October 23, 2006 with Custodian's response on same date.
- Complainant's OPRA request dated February 26, 2007 with Custodian's response dated March 1, 2007.
- Letter from the Custodian's Counsel to the GRC dated April 19, 2007.

The Custodian states that she received the Complainant's first OPRA request on October 2, 2006. The Custodian states that she responded in writing to the Complainant on the same day informing him that the hearings involving these records were still pending. The Custodian states that she received a second OPRA request from the Complainant on October 23, 2006. The Custodian states that she responded again in writing on the same day and informed the Complainant that the Borough Zoning Officer had advised that the hearings involving these records were still pending. The Custodian states that she received a third OPRA request on February 26, 2007. The Custodian states that she responded in writing four (4) business days later stating that the Borough Zoning Officer had advised that no records existed for such dates.

September 12, 2007

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification as to whether the Custodian received or maintained the records responsive prior to any of the three OPRA requests provided by the Complainant.

September 17, 2007

E-mail from the Custodian to the GRC. The Custodian certifies that at no time did she have possession, receive or maintain any of the requested records. The Custodian further certifies that she has never received or maintained these records.

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.

In this complaint, the Custodian provided a written response to each of the Complainant's October 2, 2006, October 23, 2006 and February 26, 2007 OPRA requests directly on the OPRA request forms within the statutorily mandated seven (7) business days required pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

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.

The Custodian's October 2, 2006 and October 23, 2006 responses to the Complainant's OPRA requests of the same dates stating that the hearing in the matters was still pending do not set forth a lawful reason for denial of access to the requested records under OPRA contained in N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9.a. However, because the Custodian certified that she never received or maintained the requested summonses, the Custodian's March 1, 2007 response to the Complainant's February 26, 2007 OPRA request stating that no records responsive exist is authorized by OPRA pursuant to Louis Perry v. Township of Pennsauken, GRC Complaint No. 2004-19 (May 2004).

The Custodian, therefore, unlawfully denied access to the requested records in the October 2, 2006 and October 23, 2006 requests and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

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 (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 the Custodian undertook a timely response to the Complainant’s three (3) OPRA requests even though the Custodian’s responses to the Complainant’s October 2, 2006 and October 23, 2006 OPRA requests was unlawful. The evidence also indicates that the Custodian relied upon the advice of the Borough Zoning Officer in making her October 2, 2006 and October 23, 2006 responses to the Complainant’s OPRA requests of these dates. The evidence indicates that the Custodian’s response to the Complainant’s February 26, 2007 OPRA request was lawful because the Custodian certified that she never maintained or received the requested records. Finally, the Complainant received all records responsive on April 17, 2007.

Because the Custodian responded in a timely manner to all three requests, was relying on advice from the Borough Zoning Officer, and provided a lawful response to the Complainant’s February 26, 2007 OPRA request, 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 she 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 failed to set forth a lawful reason for the denial of access to the Complainant’s October 2, 2006 and October 23, 2006 OPRA requests, the Custodian unlawfully denied access to the requested records in the October 2, 2006 and October 23, 2006 requests and failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. The Custodian has borne her burden of proving that the denial of access to the Complainant’s February 26, 2007 OPRA request was lawful since no records were responsive to the Complainant’s February 26, 2007 OPRA request and the Custodian certifies that she has never received or maintained the requested records.
3. Because the Custodian responded in a timely manner to all three requests, was relying on advice from the Borough Zoning Officer, and provided a lawful response to the Complainant’s February 26, 2007 OPRA request, 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 she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007