



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

Michael J. Matthews, Jr.
Complainant

Complaint No. 2008-123

v.

City of Atlantic City (Atlantic)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 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 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 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. The Custodian would not have unlawfully denied access to the Complainant’s April 7, 2008 OPRA request except that her failure to respond in writing granting access, denying access, requesting clarification or requesting an extension of the statutorily mandated seven (7) business days resulted in a deemed denial of access pursuant to Cottrell v. Rowan University, GRC Complaint No. 2006-04 (April 2006), N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. The Custodian was under no obligation to create a list compatible to the Complainant’s OPRA request because OPRA does not require a Custodian to produce new documents in response to an OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).



4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the requested records in their entirety approximately sixteen (16) business days following the date of the Complainant's 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 "deemed" 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 25th Day of February, 2009

Robin Berg Tabakin, Chair
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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Michael J. Matthews, Jr.¹
Complainant**

GRC Complaint No. 2008-123

v.

**City of Atlantic City (Atlantic)²
Custodian of Records**

Records Relevant to Complaint: All employee demotions from January, 1999 to January, 2007 including the following information:

1. Employee name.
2. Employee ID number.
3. Demotion date.
4. Demotion reason.
5. Base salary before and after demotion.
6. Job title before and after demotion.

Request Made: April 7, 2008

Response Made: April 29, 2008

Custodian: Rosemary Adams

GRC Complaint Filed: June 10, 2008³

Background

April 7, 2008

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

April 29, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixteenth (16th) business day following receipt of such request. The Custodian provides a list of demotions to the Complainant.

June 10, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 7, 2008.

¹ No legal representation listed on record.

² Represented by Michaela Osusky Davis, Esq. (Atlantic City, NJ).

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

The Complainant states that he submitted an OPRA request to the Custodian on April 7, 2008. The Complainant states that he contacted the Custodian on April 28, 2008 to inquire as to the status of his request. The Complainant asserts that the Custodian initially denied access to the requested record stating that the City did not have to provide the requested record, but that the Complainant was then notified on April 29, 2008 that some information was available for pickup and that more time would be needed to gather the rest of the information.

The Complainant contends that the record released to him was not the record he requested. The Complainant states that the demotion list did not include a few of the elements specifically identified, such as base salary before and after the demotion. The Complainant asserts that he contacted Ms. Davine Wade (“Ms. Wade”) of the Human Resources (“HR”) Department to inform her that the record provided was not the record the Complainant requested. The Complainant asserts that Ms. Wade informed him that she was still working on the request.

The Complainant asserts that he called Ms. Wade on May 14, 2008 and May 21, 2008. The Complainant asserts that Ms. Wade informed him on May 21, 2008 that the system used to produce the demotion list does not contain base salary information. The Complainant asserts that Ms. Wade suggested going back to the Custodian or to Payroll to get the base salary information he was seeking.

The Complainant asserts that he called Ms. Wade on June 6, 2008, at which time she asked for a few more days to prepare a memo. The Complainant states that he received no response from Ms. Wade as of June 9, 2008.

The Complainant did not agree to mediate this complaint.

July 18, 2008

Request for the Statement of Information sent to the Custodian.

July 24, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated April 7, 2008
- List of all demotions from January, 1999 to April, 2008.
- Certification of the Custodian dated July 22, 2008.
- Certification of Davine Wade, administrative clerk in the Human Resources Department for the City of Atlantic City, dated July 24, 2008.

The Custodian certifies that upon receipt of the Complainant’s OPRA request, she forwarded the request to HR for a response. The Custodian certifies that HR requested additional time to respond and that the Custodian verbally notified the Complainant of such request. The Custodian certifies that HR provided the record responsive to the Custodian on April 29, 2008. The Custodian certifies that she provided the record to the Complainant on the same date.

Ms. Wade certifies that she was the HR employee assigned to respond to the OPRA request made by the Complainant. Ms. Wade certifies that she received the Complainant's request from the Custodian.⁴ Ms. Wade certifies that she advised the Custodian that an extension of time would be needed and that she also verbally advised the Complainant that she was working on the request. Ms. Wade certifies that she searched through the payroll/financial system to obtain a list of employees demoted within the requested time frame. Ms. Wade certifies that the computer generated the responsive demotion list with the names, job titles, salary of employees and demotion dates. Ms. Wade certifies that the demotion list was provided to the Custodian on April 29, 2008. Ms. Wade certifies that she advised the Custodian that HR had no program available that would provide the Complainant with all of the elements specifically identified and that what was released to the Custodian is the only information kept by the City of Atlantic City.

Counsel states that the Complainant submitted an OPRA request to the Custodian on April 7, 2008 for the records relevant to this complaint. Counsel states that the Custodian provided the Complainant with a list of all demotions from January, 1999 to April, 2008 on April 29, 2008. Counsel states that the information not provided was the employee ID No., demotion reason, base salary before and after demotion and job title before demotion because the database did not contain this information. Counsel further asserts that the record provided and all information not provided is beyond the scope of disclosure pursuant to OPRA.

Counsel asserts that personnel records are subject to disclosure pursuant to N.J.S.A. 47:1A-10 and Executive Order No. 11 (Gov. Byrne, 1974) ("E.O. No. 11"). Counsel asserts that a limited amount of information from personnel files is specifically identified as subject to disclosure, including the employee's name, title, position, salary, payroll record, length of service, date of separation, the reason for separation and amount and type of any pension pursuant to N.J.S.A. 47:1A-10 and E.O. No. 11. Counsel contends that because employee demotion information does not fall within the specific list of information subject to disclosure, the Custodian should have denied access to the requested demotion list pursuant to N.J.S.A. 47:1A-10 and E.O. No. 11 instead of erroneously providing the demotion list to the Complainant.

Counsel also argues that the additional information requested by the Complainant is not subject to disclosure pursuant to OPRA. Counsel contends that demotion information is exactly the type of information that the Legislature intended to protect as an exception to disclosure in N.J.S.A. 47:1A-10. Counsel contends that the City of Atlantic City has a responsibility to protect an employee's personnel information which would violate the employee's reasonable expectation of privacy if disclosed and cites to Michelson v. Wyatt, 379 N.J. Super. 611, 620-621 (App. Div. 2005).

Counsel also argues that a record containing all of the information specifically identified in the Complainant's OPRA request does not exist. Counsel asserts that OPRA does not require the Custodian to review its files and analyze, collate and compile data, but that the Complainant must specifically describe the record requested.

⁴ Ms. Wade does not provide a date that she received the Complainant's OPRA request from the Custodian. Michael J. Matthews v. City of Atlantic City (Atlantic), 2008-123 – Findings and Recommendations of the Executive Director 3

Counsel requests that the GRC deny the relief sought by the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested demotion list?

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. 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).

In this complaint, the Custodian failed to respond to the Complainant in writing until sixteen (16) days after receipt of the Complainant’s April 7, 2008 OPRA request.

Therefore, 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 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).

The Complainant in this matter contends that the record disclosed was not the record he requested. The Complainant argues that although the record contains some of the information he requested, the record also lacked information. Ms. Wade, the HR employee assigned to obtain the requested record and provide it to the Custodian, certifies that the demotion list was provided in its entirety and that the information provided was the only information kept on file by the City of Atlantic City.

In Cottrell v. Rowan University, GRC Complaint No. 2006-04 (April 2006), the Custodian certified that the records responsive to the Complainant’s December 13, 2005 OPRA request Items No. 2, No. 3 and No. 5 were provided to the Complainant on January 13, 2006. The GRC held that the Custodian would not have unlawfully denied access to these items “except that his failure to respond within the statutorily mandated seven (7) business days resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i.”

Similarly, the Custodian certifies to providing the record responsive in its entirety to the Complainant on April 29, 2008, sixteen (16) business days following receipt of the Complainant’s request, which resulted in a deemed denial. Therefore, the Custodian would not have unlawfully denied access to the Complainant’s April 7, 2008 OPRA request except that her failure to respond in writing granting access, denying access, requesting clarification or requesting an extension of the statutorily mandated seven (7) business days resulted in a deemed denial of access pursuant to Cottrell, supra, N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Further, 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.

The New Jersey Superior further stated in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) that "NJBA's request required COAH's custodian to...produce new documents...OPRA does not require an agency to perform such tasks..." *Id.* at 171.

The evidence of record in this complaint shows that information that the Complainant argues was not provided with the record responsive has never been maintained as part of the actual record released to the Complainant. Therefore, the Custodian was under no obligation to create a list compatible to the Complainant's OPRA request because OPRA does not require a Custodian to produce new documents in response to an OPRA request pursuant to MAG, *supra* and NJ Builders, *supra*.

Additionally, Counsel argues that the record responsive to the Complainant's April 7, 2008 OPRA request should not have been disclosed to the Complainant because demotion records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and E.O. No. 11. However, because the records were already disclosed in their entirety to the Complainant, this argument has been rendered moot.

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 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).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the requested records in their entirety approximately sixteen (16) business days following the date of the Complainant's 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 "deemed" 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. 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 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. The Custodian would not have unlawfully denied access to the Complainant's April 7, 2008 OPRA request except that her failure to respond in writing granting access, denying access, requesting clarification or requesting an extension of the statutorily mandated seven (7) business days resulted in a deemed denial of access pursuant to Cottrell v. Rowan University, GRC Complaint No. 2006-04 (April 2006), N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. The Custodian was under no obligation to create a list compatible to the Complainant's OPRA request because OPRA does not require a Custodian to produce new documents in response to an OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v.

New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the requested records in their entirety approximately sixteen (16) business days following the date of the Complainant's 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 "deemed" 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

February 18, 2009