



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 11, 2009 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2008-13

v.

City of Hoboken (Hudson)
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 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 because in the Custodian’s timely response to the Complainant’s OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant’s voluminous request which would substantially disrupt the agency’s operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant’s OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47: 1A-5.g., *New Jersey Builders Association v. Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007), *Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety*, GRC Complaint No. 2007-63 (May 2007) and *Thomas Caggiano v. Borough of Stanhope*, GRC Complaint No. 2006-220 (September 2007).

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 11th Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: June 16, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 11, 2009 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2008-13

v.

**City of Hoboken² (Hudson)
Custodian of Records**

Records Relevant to Complaint: Review of the property files for all of the properties in Exhibit A.³

Request Made: December 3, 2007

Response Made: December 11, 2007

Custodian: Michael Mastropasqua

GRC Complaint Filed: January 15, 2008⁴

Background

December 3, 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 11, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the list attached to the Complainant's OPRA request encompasses 800-1,000 separate large files. The Custodian further states that the Complainant may not review the files without supervision. The Custodian concludes that the Complainant's massive request would substantially disrupt the operation of the Construction Office.⁵ The Custodian indicates that he is willing to consider reasonable alternatives for fulfilling the Complainant's OPRA request. The Custodian requests that the Complainant tailor his OPRA request more narrowly or provide an alternative suggestion for resolving this issue. The Custodian further requests that the Complainant contact him to discuss this matter.

¹ No legal representation listed on record.

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

³ Exhibit A is a fifty (50) page list of properties.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The City of Hoboken Construction Office is the agency that holds the records requested by the Complainant.

December 12, 2007

Letter from the Complainant to the Custodian. The Complainant suggests that the Custodian provide him with the one (1) page inspection report for each of the properties in the list attached to the Complainant's OPRA request. The Complainant states that he will be able to limit his request once he has reviewed the inspection reports.

January 15, 2008

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

- Complainant's OPRA request dated December 3, 2007 (with attachments, including the first page of Exhibit A)
- Letter from the Custodian to the Complainant dated December 11, 2007

The Complainant asserts that on or about December 3, 2007, he submitted an OPRA request to the Custodian. The Complainant further asserts that on or about December 11, 2007, the Custodian asked the Complainant to provide an alternative means of fulfilling the Complainant's OPRA request. The Complainant states that he provided an alternative suggestion on December 12, 2007. The Complainant further asserts that the Complainant received no further communication from the Custodian.

January 31, 2008

Letter from the Custodian to the Complainant. The Custodian states that the Complainant's alternative suggestion is burdensome and disruptive to the operation of the Construction Office. The Custodian reiterates his willingness to make reasonable accommodation of the OPRA request. The Custodian offers to make a reasonable number of files available to the Complainant. The Custodian states that if the Complainant cannot narrow his request, then the Custodian must deny the Complainant's OPRA request.

February 4, 2008

Letter from the Complainant to the Custodian. The Complainant requests that the Custodian provide as many of the requested inspection reports as required by OPRA. The Complainant states that the two (2) month delay in the Custodian's response to the Complainant's proposal is excessive. The Complainant requests that all future replies adhere to the seven (7) day deadline specified in OPRA.

February 6, 2008

Offer of Mediation sent to both parties. Neither the Complainant nor the Custodian responded to the Offer of Mediation.

February 29, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

March 4, 2008

E-mail from the GRC to the Custodian. The GRC states that pursuant to the Custodian's request, enclosed is another copy of the Denial of Access Complaint.

March 10, 2008

E-mail from the Custodian to the GRC. The Custodian requests an extension of the deadline for filing the SOI.

March 10, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension. The Custodian's new deadline for submitting the SOI to the GRC is March 17, 2008.

March 24, 2008

Letter from the GRC to the Custodian. The GRC indicates that the GRC requested the Custodian complete a Statement of Information on February 29, 2008,⁶ and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

March 26, 2008

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

- Complainant's OPRA request dated December 3, 2007 (with attachments)
- Letter from the Custodian to the Complainant dated December 11, 2007
- Letter from the Complainant to the Custodian dated December 12, 2007
- Letter from the Custodian to the Complainant dated January 31, 2008
- Letter from the Complainant to the Custodian dated February 4, 2008
- Certification from Alfred Arezzo

Alfred Arezzo certifies that he is the Construction Official for the City of Hoboken ("City"). Mr. Arezzo further certifies that the Complainant's request encompasses between 800-1,000 separate property files. Mr. Arezzo also certifies that these files generally contain a minimum of thirty (30) documents but in some cases may contain hundreds of pages of documents. Mr. Arezzo further certifies that he would be required to review and redact from each document information that could jeopardize the safety and security of a building and its occupants. Mr. Arezzo certifies that once he has reviewed all the files requested by the Complainant, a member of the staff must supervise the Complainant while he reviews the records requested. Mr. Arezzo also certifies that he does not object to the Complainant reviewing any of the agency's files. Mr. Arezzo certifies that the Complainant's request would take hundreds of hours of staff time to accommodate. Mr. Arezzo certifies that his office is one of the busiest in the State of New Jersey and quite often there is a line out of the door of people waiting to be serviced. Mr. Arezzo further certifies that he could not properly serve the public if he was required to fulfill the Complainant's OPRA request as is.

Mr. Arezzo certifies that the Complainant's alternative suggestion is also overly burdensome and disruptive to the Construction Office. Mr. Arezzo certifies that the Complainant's alternative suggestion would require the sorting of 800-1,000 files to

⁶The GRC originally sent the Custodian the request for the SOI on February 29, 2008. The GRC granted the Custodian an extension on March 10, 2008, thereby extending the deadline for submission of the SOI to March 17, 2008.

locate and copy the particular document which contains the information the Complainant has requested. Mr. Arezzo estimates that the Complainant's alternative suggestion would require more than one hundred (100) hours of his staff's time. Mr. Arezzo certifies that he is prepared to allow access to individual files. Mr. Arezzo objects to the random, non-specific and voluminous nature of the Complainant's OPRA request.

The Custodian argues that in order to accommodate the Complainant's request, Mr. Arezzo would have to review each document in the file for non-disclosable information pursuant to Cardillo v. Hoboken, GRC Complainant No. 2005-158 (requiring that any document such as building plans, which contains information that could jeopardize the security of a building or the occupants, be carefully redacted before release). The Custodian further argues that the City's response of December 11, 2007 was timely and proper. The Custodian further argues that the City informed the Complainant that the OPRA request would substantially disrupt agency operation and attempted to reach a reasonable accommodation pursuant to N.J.S.A. 47:1A-5.g. The Custodian argues that for the reasons stated by Mr. Arezzo, the Complainant's response of December 12, 2007 is vague and ambiguous. The Custodian argues that even if the Complainant's alternative was comprehensible, it is still substantially disruptive and burdensome to the operation of the Construction Office.

The Custodian states that due to a miscommunication between the legal department and the Custodian, the Custodian's letter to the Complainant to address his counter proposal of December 12, 2007 was delayed until January 31, 2008. The Custodian states that during the delay, there was no contact between the Complainant and the Custodian. The Custodian asserts that the City is willing to reasonably accommodate the Complainant's OPRA request. The Custodian argues that the Complainant's February 4, 2008 response to the Custodian's January 31, 2008 letter was too vague to allow the City to properly respond.

The Custodian argues that the Complainant's OPRA request was broad and unclear. The Custodian further argues that pursuant to Bent v. Township of Stafford 381 N.J. Super. 30, 37 (App. Div. 2005), MAG v. State ABC Board, 375 N.J. Super. 534, 549 (App. Div. 2005), and Mason v. Hoboken, A-0508-06T5 (App. Div. 2008), the City is not required to conduct open-ended random searches to fulfill the Complainant's OPRA request. In conclusion, the Custodian asserts that he has not unlawfully denied the Complainant access to the records requested. The Custodian further asserts that the City remains willing to allow the Complainant access to the Construction Office's files.

April 7, 2008⁷

The Complainant's response to the Custodian's SOI. The Complainant argues that his request is not vague because he provided the addresses of the property files he wanted to review. Citing Mag, *supra*, and Bent, *supra*, the Complainant argues that his request was not open-ended. The Complainant argues that the records sought are sufficiently identified in the list the Complainant provided. The Complainant states that he further limited his request on February 20, 2008.⁸ The Complainant states that he

⁷ 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.

⁸ There is no evidence in the record to support this claim.

provided the Custodian with a sample copy of the inspection sheet that he wanted pursuant to the alternative suggestion. The Complainant argues that his request is not random because he provided a chronological list of addresses for the files he wanted to review. The Complainant argues that his request is not burdensome because he offered to allow the Custodian to provide as many records as required under OPRA. The Complainant requests that the GRC finds that the Custodian knowingly and willfully violated OPRA and award penalties accordingly.

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:

“[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 on the request form and promptly return it to the requestor. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny 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....” 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.

The Custodian responded in writing to the Complainant’s OPRA request on December 11, 2007, the sixth (6th) business day following receipt of such request. The Custodian stated that the fifty (50) page list attached to the Complainant’s OPRA request encompassed 800-1,000 separate large files. Because completing the Complainant’s OPRA request as is would substantially disrupt operation of the agency, the Custodian indicated that he was willing to consider reasonable alternatives for fulfilling the Complainant’s OPRA request. On December 12, 2007, the Complainant requested that the Custodian provide him with the one (1) page inspection report for each of the properties listed in the Complainant’s OPRA request. On January 31, 2007, the Custodian stated that the Complainant’s alternative suggestion was burdensome and disruptive to the operation of the Construction Office. The Custodian stated that if the Complainant could not narrow his request, then the Custodian would have to deny the Complainant’s OPRA request because it would substantially disrupt operations.

The New Jersey Superior Court identifies the responsibilities of the requestor and the records custodian relevant to the prompt access to identifiable government records the law is designed to provide. Specifically, the custodian must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." New Jersey Builders Association v. New Jersey Council On Affordable Housing, 390 N.J. Super. 166, 179 (App. Div. 2007), citing N.J.S.A. 47:1A-5.a.-j. The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5.f., N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. *Id.* (Emphasis added).

As the Appellate Division stated in NJ Builders, *supra*,

“There is an obvious connection between the specificity of the request and a custodian's ability to provide a prompt reply. The form for requests adopted by COAH explains the connection by advising the requestor as follows: ‘To expedite the request, be as specific as possible in describing the records being requested.’ *Id.* at 179.

With a voluminous, overly broad, or unclear OPRA request, the seven (7) business day rule regarding responses to OPRA requests does not afford the custodian time to speculate about what the requestor seeks, research, survey agency employees to determine what they considered or used, or generate new documents that provide information sought. *Id.* For that reason, the requestor's obligation "to specifically describe the document sought," Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 at 212 (App.Div. 2005), is essential to the agency's obligation and ability to provide a prompt response. See MAG Entertainment LLC v. Division of Alcohol & Beverage Control, 375 N.J. Super. 534 at 547 (App.Div. 2005)(noting that in State ex rel. Dillery v. Icsman, 92 Ohio St. 3d 312, 2001 Ohio 193, 750 N.E.2d 156, 159 (Ohio 2001)(an attorney's fee was denied "because the request was improper due to the fact that it failed to identify the desired records with sufficient clarity").

In NJ Builders, *supra*, the Appellate Division determined that a five (5) page, thirty nine (39) paragraph OPRA request for records bore no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a brief description of the record sought." N.J.S.A. 47:1A-5.f.

The court in NJ Builders also noted that "[d]escriptions of the sort NJBA gave COAH have been found inadequate by courts of other jurisdictions applying similar statutes, and this court has determined that OPRA should be applied in the same manner. See MAG, *supra*, 375 N.J. Super. at 546-49." NJ Builders, *supra* at 179. Because NJBA's voluminous request was "so far removed from the type of OPRA request anticipated by the Legislature," the court concluded that the custodian was not bound by those provisions of OPRA "which require timely response and provide for an award of attorney's fees when such access is denied and litigation is required. See N.J.S.A. 47:1A-5.i.; N.J.S.A. 47:1A-6." *Id.* See also, Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005)(finding that a five-part request for the "entire file" of his criminal investigation and "'the factual basis underlying documented action and advice to third parties" is not a proper request for public records under OPRA, and the information sought is beyond the statutory reach of OPRA); Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 17, 2003)(dismissing request for annual costs of liability settlements by the Township for each of five years, including costs for "legal defense of said items[,] because the requestor failed to identify any specific record in the custodian's possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

Regarding a similar voluminous records request in Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), the GRC ruled that based upon the Appellate Division's decision in NJ Builders, *supra*, the Complainant's voluminous request – a thirteen (13) paragraph request for numerous records, was not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a brief description of the record sought." Additionally, the GRC ruled that based on the custodian's certification that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial

disruption to the agency's operations, and the custodian's efforts to reach a "reasonable solution" with the complainant that accommodates the interests of the requestor and the agency, and the voluminous nature of the complainant's request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i.

Moreover, in Thomas Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007), the complainant's seven (7) page, fifty nine (59) item request sought access to voluminous records from the Borough of Stanhope. The custodian responded in writing to the complainant within seven (7) business days of receiving the request and alerted the complainant that the custodian required additional time to respond to the voluminous OPRA request. The custodian advised the complainant that she could not reasonably keep up with his ongoing submission of OPRA requests without substantially disrupting the functioning of her office. The custodian attempted to reach a mutually-agreeable solution to balance the complainant's right to access government records with the custodian's need to manage her job responsibilities without substantial disruption.

The GRC held that, based on the custodian's certification that granting access to the voluminous records requested by the complainant in his seven (7) page, fifty nine (59) itemized request spanning over twelve (12) years, would result in a substantial disruption to the agency's operations, and the custodian's efforts to reach a reasonable solution with the complainant that accommodated the interests of the requestor and the agency, and the voluminous nature of the complainant's OPRA request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i and consistent with the GRC's decision in Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007) and New Jersey Builders Association v. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

In the matter now before the Council, the Complainant's December 3, 2007 fifty (50) page OPRA request, like the requests in NJ Builders, *supra*, Vessio, *supra*, and Caggiano, *supra*, is voluminous in nature. The Custodian's timely written response noted that the Complainant's OPRA request was voluminous and fulfilling it would substantially disrupt the service of this agency. The Custodian subsequently attempted to reach a reasonable accommodation of the Complainant's OPRA request. However, the Complainant's responses to the Custodian's attempts to accommodate the Complainant's OPRA request were vague and failed to narrow the scope of the Complainant's OPRA request to a more manageable scale.

Because in the Custodian's timely response to the Complainant's OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant's voluminous request which would substantially disrupt the agency's operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant's OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47: 1A-5.g., NJ Builders, *supra*, Vessio, *supra*, and Caggiano, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because in the Custodian's timely response to the Complainant's OPRA request, the Custodian attempted to reach a reasonable accommodation of the OPRA request with the Complainant regarding the Complainant's voluminous request which would substantially disrupt the agency's operations, and because once it became evident that the parties could not reach an accommodation, the Custodian informed the Complainant that he would have to deny the Complainant's OPRA request, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47: 1A-5.g., *New Jersey Builders Association v. Council on Affordable Housing*, 390 N.J. Super. 166 (App. Div. 2007), *Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety*, GRC Complaint No. 2007-63 (May 2007) and *Thomas Caggiano v. Borough of Stanhope*, GRC Complaint No. 2006-220 (September 2007).

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2009