



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
Governor

**CHARLES A. RICHMAN**  
Acting Commissioner

**FINAL DECISION**

**November 18, 2009 Government Records Council Meeting**

Ronald Bonadies  
Complainant

Complaint No. 2008-153

v.

Borough of Kenilworth, Tax & Finance Office (Union)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 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. Under the state of the law at the time of the Complainant’s requests, the Complainant’s records requests dated April 22, 2008 and May 1, 2008 are not valid OPRA requests because the Complainant failed to submit said requests on the Borough’s official OPRA request form, and as such, there is no unlawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-5.g., MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005), and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).
2. Because the Complainant’s records requests are not valid OPRA requests, and because the Tax Collector did not unlawfully deny access to records under OPRA, it is concluded that the Tax Collector did not knowingly and willfully violate OPRA.

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 18<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 24, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Ronald Bonadies<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-153**

v.

**Borough of Kenilworth, Tax & Finance Office (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

- Letter Request dated April 22, 2008 - statement of the real estate taxes assessed on the Complainant's property for 2007 and 2008, including a statement whether any taxes are due and owing.
- Letter Request dated May 1, 2008 - statement of the real estate taxes assessed on the Complainant's property for 2007 and 2008.

**Requests Made:** April 22, 2008 and May 1, 2008

**Responses Made:** April 24, 2008 and May 5, 2008

**Custodian:** Hedy Lipke

**GRC Complaint Filed:** July 17, 2008<sup>3</sup>

**Background**

**April 22, 2008**

Letter from Complainant's Counsel to Nancy Nichols, Tax Collector, on behalf of the Complainant. The Complainant's Counsel requests the records relevant to this complaint listed above.

**April 24, 2008**

Letter from Tax Collector to Complainant's Counsel on the second (2<sup>nd</sup>) business day following receipt of Counsel's letter request. The Tax Collector states that she cannot provide a statement of taxes on the Complainant's property because the Complainant is exempt from paying taxes and thus no taxes were levied on the property in 2007 or 2008.

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<sup>1</sup> Represented by Dennis Haas, Esq., of Sweeney Lev, LLC (Kenilworth, NJ).

<sup>2</sup> Represented by Harvey Fruchter, Esq., of Fruchter & Associates, LLC (Kenilworth, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**May 1, 2008**

Letter from Complainant to Tax Collector. The Complainant states that the Tax Collector has denied access to his request for tax figures on his property. The Complainant asserts that it is illegal under the Open Public Records Act (“OPRA”) to deny access to records. The Complainant contends that although OPRA mandates that a custodian must safeguard from public access an individual’s personal information, a custodian must still disclose the requested tax information. The Complainant asserts that the Tax Collector is required to release the tax figures for the years 2007 and 2008 as requested by the Complainant’s Counsel. Additionally, the Complainant states that by law, the Tax Collector has seven (7) days from the date she receives this letter to provide a response to the Complainant or his Counsel.

**May 5, 2008**

Letter from Tax Collector to Complainant on the second (2<sup>nd</sup>) business day following receipt of the Complainant’s letter request. The Tax Collector encloses a printout of the real estate taxes assessed on the Complainant’s property for 2007 and 2008, which the Tax Collector states are the Borough’s official records. The Tax Collector states that said printout indicates that the Complainant’s property has been coded as class 15F, or tax exempt, meaning that no taxes have been levied against the Complainant’s property.

Additionally, the Tax Collector states that she spoke to the Borough Clerk who indicated that the Borough has not received an official OPRA request from the Complainant. As such, the Tax Collector asserts that she is not in violation of OPRA.

**July 17, 2008**

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

- Letter from Complainant’s Counsel to Nancy Nichols, Tax Collector, on behalf of the Complainant dated April 22, 2008
- Letter from Tax Collector to Complainant’s Counsel dated April 24, 2008
- Letter from Complainant to Tax Collector dated May 1, 2008
- Letter from Tax Collector to Complainant dated May 5, 2008

The Complainant states that he submitted his OPRA request on or about April 22, 2008. The Complainant states that the Tax Collector provided the figures billed to the Complainant, which is zero, and denied access to what he actually requested, which is the figures that would be calculated for 2007 and 2008 for any other resident.

The Complainant asserts that OPRA does not allow a custodian to withhold tax information. Additionally, the Complainant contends that OPRA does not state that in order to be in violation of the Act, records must be requested through any OPRA official. The Complainant claims that the Tax Collector knowingly and willfully violated OPRA.

Further, the Complainant does not agree to mediate this complaint.

**July 29, 2008**

Request for the Statement of Information (“SOP”) sent to the Custodian.

**August 4, 2008**

Custodian’s SOI signed by the Custodian’s Counsel.

**August 5, 2008**

Letter from GRC to Custodian’s Counsel. The GRC states that the Custodian is required to sign the SOI. The GRC requests that Counsel resubmit the Custodian’s SOI under her signature.

**August 11, 2008**

Custodian’s SOI with the following attachments:

- Letter from Tax Collector to Complainant’s Counsel dated April 24, 2008
- Letter from Tax Collector to Complainant dated May 5, 2008
- Statement of taxes for Complainant’s property for tax year 2007-2008

The Custodian certifies that she has not received an official OPRA request from the Complainant. The Custodian asserts that this Denial of Access Complaint is without merit because the Complainant has not submitted an official OPRA request to the Borough.

The Custodian states that the Complainant made an inquiry to the Tax Collector regarding the taxes assessed on his property, which the Tax Collector provided to the Complainant. The Custodian states that if the Complainant seeks anything other than the information already provided to him by the Tax Collector, he may submit an official OPRA request to the Clerk’s Office.

**Analysis**

**What constitutes a valid OPRA records request?**

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian “shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency.” N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;

- (6) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied. *Id.*

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that "each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also* G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

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.* 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.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian "shall" sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See* Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word "shall" in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its

policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA's central purpose of making government records "readily accessible" to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute's form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor's general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a "brief description" of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Therefore, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form.

It should be noted that the Council takes cognizance of the Appellate Division's recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). In Renna, the Appellate Division held that:

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g."

Renna was decided on May 21, 2009, ten (10) months after the complaint was filed in the instant matter. Therefore, for the Renna decision to be considered in this matter it will have to be retroactively applied.

The New Jersey Supreme Court "has adopted the United States Supreme Court's definition that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final." State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334, 349 reh'g denied, 490 U.S. 1031, 109 S. Ct. 1771, 104 L. Ed.2d 266 (1989)). See also State v. Johnson, 166 N.J. 523, 546-47 (2001); State v.

Knight, 145 N.J. 233, 250-51 (1996).” State v. Yanovsky, 340 N.J.Super. 1 (App. Div. 2001).

Although retroactive application of laws is generally disfavored, Gibbons v. Gibbons, 86 N.J. 515, 521 (1981), a clear intention by the Legislature that retroactive application is intended will be given effect. Phillips v. Curiale, 128 N.J. 608, 618 (1992). Courts recognize that retroactive laws enacted pursuant to the police power may impair the rights of individuals, Rothman v. Rothman, 65 N.J. 219, 225-226 (1974), but where the public interest sufficiently outweighs the impaired private right, retroactive application is permissible. State Troopers Fraternal Assoc. v. New Jersey, 149 N.J. 38, 57 (1997).

In determining retroactive application of a new rule, four judicial options are available:

(1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review [pipeline retroactivity]; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974). State v. Knight, 145 N.J. 233, 249 (1996).

The determination of retroactive application is generally guided by three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 251 (citation and internal quotations omitted).

In Knight, the Court granted pipeline retroactivity to the rule previously announced in State v. Sanchez, 129 N.J. 261 (1992), that "post-indictment interrogation of defendant violated his right to counsel under Article 1, paragraph 10 of the New Jersey Constitution" requiring suppression of his confession, *Id.* at 279, because the purpose of that exclusionary rule was also to enhance the reliability of confessions. Knight supra, 145 N.J. at 256-58.

Although the Knight Court was addressing the retroactive application of a new rule in a criminal setting, the New Jersey Supreme Court has applied similar reasoning in the civil setting. In Olds v. Donnelly, 150 N.J. 424, 442 (1997), the Court abrogated its decision in Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and exempted attorney malpractice actions from the entire controversy doctrine. In addressing whether the decision should be applied retroactively or prospectively, the Court recognized that "[o]rdinarily, judicial decisions apply retroactively. Crespo v. Stapf, 128 N.J. 351, 367 (1992)... [but] [p]olicy considerations may justify giving a decision limited



retroactive effect.” *Ibid.* The Court then examined the considerations articulated in Knight and concluded that the Olds decision should be given limited “pipeline” retroactivity because such application “adequately protect existing relationships[,]” and because the application of pipeline retroactivity to pending cases “serves the interests of justice by permitting resolution of their claims on the merits.” *Id.* at 450. Perhaps most importantly, the Court recognized that complete retroactive application potentially exposes the judicial system to the undue burden of revisiting numerous matters already concluded. *Id.* See, e.g., Constantino v. Borough of Berlin, 348 N.J. Super. 327 (App. Div. 2002)(holding that the public interest in retroactive application of the Age Discrimination in Employment Act, 29 U.S.C.A. §621 et seq., which specifically prohibited municipalities from hiring persons as police officer under age 21 or over age 35, outweighs an individual’s private rights); State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001)(holding that State v. Carty, 332 N.J. Super. 200 (App. Div. 2000) established a new rule of law during the pendency of the case, but that the public interest and administration of justice favored limited application of retroactivity); Zuccarelli v. NJDEP, 376 N.J. Super. 372 (App. Div. 1999)(holding that cases which held New Jersey’s waste flow control system was unconstitutional and discriminatory should be applied retroactively only to cases in the “pipeline”).

Here, the GRC examined the degree of reliance upon prevailing Council decisions with respect to the use of request forms and found that the conclusion that ***OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form*** was repeatedly cited by the GRC in prior adjudications. And because records custodians relied upon said decisions, the retroactive application of the new rule articulated in Renna, *supra*, would likely foster confusion among many records custodians who already responded to OPRA requests predating the Renna court’s decision. Accordingly, the GRC will not apply the Renna court’s rule retroactively, but rather only apply it, when applicable, to complaints whose operative facts arise after the rule was articulated.

Under the state of the law at the time of the Complainant’s requests, the Complainant’s records requests dated April 22, 2008 and May 1, 2008 are not valid OPRA requests because the Complainant failed to submit said requests on the Borough’s official OPRA request form, and as such, there is no unlawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-5.g., MAG, *supra*, Bent, *supra*, and Gannett, *supra*.

**Whether the Tax Collector’s actions rise 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.

The Complainant contends that the Tax Collector knowingly and willfully violated OPRA by failing to provide the Complainant with the requested tax figures for the years 2007 and 2008.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

In this instant complaint, the Complainant’s letter requests dated April 22, 2008 and May 1, 2008 are not valid OPRA requests. As such, neither the Custodian nor the Tax Collector unlawfully denied access under OPRA. Therefore, because the Complainant’s records requests are not valid OPRA requests, and because the Tax Collector did not unlawfully deny access to records under OPRA, it is concluded that the Tax Collector did not knowingly and willfully violate OPRA.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Under the state of the law at the time of the Complainant’s requests, the Complainant’s records requests dated April 22, 2008 and May 1, 2008 are not valid OPRA requests because the Complainant failed to submit said requests on the Borough’s official OPRA request form, and as such, there is no unlawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-5.g., MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005), and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

2. Because the Complainant's records requests are not valid OPRA requests, and because the Tax Collector did not unlawfully deny access to records under OPRA, it is concluded that the Tax Collector did not knowingly and willfully violate OPRA.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009