



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 4, 2009 Government Records Council Meeting

Ricardo Gonzales
Complainant

Complaint No. 2008-255

v.

City of Gloucester (Camden)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 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. Because the Complainant’s OPRA request is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, it is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. 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 and the Custodian failed to provide a legal certification to the GRC, because the Complainant’s OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, it is concluded that the Custodian’s actions do not rise to



the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 4th 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.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Ricardo Gonzales¹
Complainant**

GRC Complaint No. 2008-255

v.

**City of Gloucester (Camden)²
Custodian of Records**

Records Relevant to Complaint:

1. Review of any and all Gloucester City laws, rules or ordinances that pertain to owner occupied rental properties.
2. Review of any and all documents that indicate the current use of 308 and/or 310 North Broadway in Gloucester City.
3. Review of any and all documents that indicate any existing nonconforming uses of 308 and/or 310 North Broadway in Gloucester City, if any exist.
4. Review of any and all documents that indicate that any past owner of 308 and/or 310 North Broadway in Gloucester City that combined deeds for these two (2) properties.³

Request Made: October 14, 2008

Response Made: October 23, 2008

Custodian: Paul J. Kain

GRC Complaint Filed: November 5, 2008⁴

Background

October 14, 2008

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.

October 23, 2008⁵

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the seventh (7th) business day following receipt of such

¹ No legal representation listed on record.

² Represented by John Kearney, Esq. (Haddon Heights, NJ).

³ The Complainant requested additional records which are not at issue in this complaint.

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

⁵ The Custodian certifies in the SOI that he responded on this date and the Complainant states that he reviewed records on October 24, 2008 and continued said review on October 27, 2008; however, the only evidence of record to support that a response was made on October 23, 2008 was a note on the Complainant's OPRA request form identifying this date as the response date. There is no evidence whether this response was verbal or written.

request. The Custodian states that the records responsive to the Complainant's request are prepared for inspection.

November 5, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated October 14, 2008.

The Complainant states that he submitted an OPRA request to the Custodian on October 14, 2008. The Complainant states that he went to the Custodian's office on October 24, 2008 and October 27, 2008 to review the records being provided by the Custodian.

The Complainant asserts that after reviewing more than 100 pages of photocopied records, the response to his OPRA request lacked many of the records requested.

The Complainant agrees to mediate this complaint.

November 17, 2008

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

December 17, 2008

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

January 8, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on December 17, 2008 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

January 12, 2009

Custodian's SOI attaching the Complainant's OPRA request dated October 14, 2008 with the Custodian's note thereon.

The Custodian certifies that his search for the requested records involved the Construction Office, Tax Assessor and Fire Department searching their files and copying numerous records pertaining to 308 and 310 North Broadway in Gloucester City. The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that he received the Complainant's OPRA request on October 14, 2008 and responded on October 23, 2008 granting access to review records.

The Custodian certifies that the only records not provided were those responsive to request Item No. 1. The Custodian states that those records can be found in the

Gloucester City Code Book and the Complainant can review this book at any time during normal business hours.

May 19, 2009

E-mail from the GRC to the Custodian. The GRC states that the evidence of record shows that the Custodian annotated on the Complainant’s October 14, 2008 OPRA request form that his office responded on October 23, 2008, but provided no written response in the SOI to support his certification. The GRC requests that the Custodian or employee that responded to the Complainant certify to the following:

1. Whether the response to the Complainant was verbal or written?

The GRC requests that this certification and supporting documentation, if any exists, be provided by close of business on May 22, 2009.⁶

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 states 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 therefor ...” 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*

⁶The Custodian failed to submit a legal certification to the GRC.
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seven business days after receiving the request ... failure to respond shall be deemed a denial of the requestThe requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (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 Complainant asserts that after reviewing over 100 pages of records over a two (2) day period, the Custodian failed to provide access to many of the records requested. Conversely, the Custodian certified in the SOI that he responded to the OPRA request on October 23, 2008 and provided all records except those responsive to request Item No. 1, which can be found in the Gloucester City Code Book.

Although the Custodian has certified that he responded on October 23, 2009, there is no evidence in the record to show that such response was written, as is statutorily required by N.J.S.A. 47:1A-5.g. The Custodian has therefore failed to bear his burden of proof that he properly responded to the OPRA request. N.J.S.A. 47:1A-6.

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).

However, the Complainant's request sought "any and all laws, rules, ordinances and documents pertaining to 308 and/or 310 North Broadway in Gloucester City." The Complainant's request did not identify specific government records sought but instead set forth the subject matter of the records sought.

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 (March 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (October 2005)⁷, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f 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." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

The Complainant in this matter failed to identify specific government records being sought. The Complainant's OPRA request for laws, rules, ordinances and all documents relating to 308 and/or 310 North Broadway in Gloucester City would have required the Custodian to search all of her records to identify those responsive to the Complainant's requests.

Therefore, because the Complainant's OPRA request is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, it is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian's "deemed" denial of the Complainant's OPRA request 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, 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).

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 and the Custodian failed to provide a legal certification to the GRC, because the Complainant's OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA

and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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. Because the Complainant's OPRA request is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, it is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. 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 and the Custodian failed to provide a legal certification to the GRC, because the Complainant's OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009