



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

September 30, 2009 Government Records Council Meeting

John A. Bart
Complainant

Complaint No. 2008-59

v.

County of Passaic Public Housing Agency
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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 items # 2-4 of 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 said request items 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 items # 2-4 of the Complainant’s OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant’s request requires an open-ended search of the Public Housing Authority’s files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009).



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 30th Day of September, 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: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**John A. Bart¹
Complainant**

GRC Complaint No. 2008-59

v.

**County of Passaic Public Housing Agency²
Custodian of Records**

Records Relevant to Complaint:

1. Utility allowance and surcharge schedules, used from February 2002 to present, for Section 8 voucher programs administered by the Passaic County Public Housing Agency (“PHA”) (including the PHA’s predecessors and agents such as management companies responsible for managing projects in the PHA’s inventory) since February 2002 (utility allowance schedules may be found on HUD Form 92458).
2. Records indicating when the most recent updates to the utility allowances took place for the Section 8 voucher programs administered by the PHA.
3. Any other utility allowance and surcharge schedules used or promulgated by the PHA that document the basis on which utility allowance and surcharge schedules and revisions thereof were established.
4. Records and data from February 2002 to present that document the basis on which utility allowance and surcharge schedules and revisions thereof were established. This should include, but not be limited to, those records or data required by the following federal regulations: 24 C.F.R. §982.517(a)(2)(Section 8 Vouchers); 24 C.F.R. §880.610 (Section 8 New Construction Projects); 24 C.F.R. §882.510 (Section 8 Moderate Rehabilitation Projects); 24 C.F.R. §886.326 (Section 8 Housing Assistance program for the Disposition of HUD-Owned Projects); 24 C.F.R. §891.440 (Supportive Housing for the Elderly and Persons with Disabilities).

Request Made: February 15, 2008

Response Made: February 26, 2008

Custodian: Angel Roman

GRC Complaint Filed: March 28, 2008³

¹ No legal representation listed on record.

² Represented by Joseph Greer, Esq. (Paterson, NJ).

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

Background

February 15, 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.

February 26, 2008

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 he has enclosed a copy of the utility allowance chart utilized by the PHA for the year 2002 and the utility allowance chart currently in use.

Additionally, the Custodian states that the factor used to adjust the allowances for the categories of heat, hot water, etc., is a fraction of the actual percentage of the increase realized for the cost of energy in the service area and throughout the country. The Custodian states that housing costs within the PHA's metropolitan statistical area are one of the highest in the country. The Custodian states that the greater the utility allowance, the less families have for rent itself. The Custodian states that even after taking into account the establishment of reasonable utility allowance, current rental costs prevent families from acquiring suitable housing units. The Custodian also states that budget restraints prevent the PHA from increasing fair market rent.

February 26, 2008

Public Information Officer's ("PIO") response to the OPRA request. The PIO responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The PIO states that she has enclosed the records responsive to the Complainant's request for utility allowance and surcharge schedules since 2002.⁴

March 28, 2008

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

- Complainant's OPRA request dated February 15, 2008
- Custodian's response to the OPRA request dated February 26, 2008
- PIO's response to the OPRA request dated February 26, 2008⁵

The Complainant states that he submitted his OPRA request on February 15, 2008. The Complainant states that he received a written response to his request dated February 26, 2008. The Complainant asserts that the Custodian has not provided access to all of the requested records.

April 16, 2008

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

⁴The records provided are the same records provided by the Custodian.

⁵The Complainant attached an additional record; however, said record is not relevant to the adjudication of this Denial of Access Complaint.

April 29, 2008

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 15, 2008
- Custodian's response to the Complainant's OPRA request dated February 26, 2008
- PIO's response to the Complainant's OPRA request dated February 26, 2008⁶

The Custodian certifies that he received the Complainant's OPRA request on February 15, 2008. The Custodian also certifies that he provided a written response to the Complainant on February 26, 2008.

The Custodian certifies that he provided the Complainant access to the records responsive to request item # 1 – allowances for tenant furnished utilities & services dated January 2002 and March 2005. Additionally, the Custodian certifies that there are no records responsive to request items # 2-4.

Additionally, the PIO asserts that the PHA conducted a thorough search of its records for the requested records. The PIO states that to the best of her knowledge, no records have been destroyed. Further, the PIO states that the Custodian provided the Complainant with all records responsive maintained on file.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the

⁶ The Custodian attached an additional record; however, said record is not relevant to the adjudication of this Denial of Access Complaint.

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.⁷ 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 instant complaint, the Custodian certified that he received the Complainant’s OPRA request on February 15, 2008. The Custodian certified that he provided the Complainant with a written response on February 26, 2008, the sixth (6th) business day following receipt of the Complainant’s request, in which he provided access to the records responsive to request item #1.⁸ Specifically, the Custodian certified that he

⁷ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

⁸ The PIO also provided a similar response to the Complainant.

provided the Complainant with the allowances for tenant utilities and services dated January 2002 and March 2005.

Additionally, the Custodian certified that there are no records responsive to request items # 2-4. However, the Custodian failed to indicate such to the Complainant in the Custodian's written response dated February 15, 2008.

Therefore, the Custodian's failure to respond in writing to items # 2-4 of 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 said request items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

However, 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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ 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."¹⁰

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..."

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 # 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)."

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, supra.

Regarding this instant complaint, specifically item # 2 of the Complainant's OPRA request, the Complainant sought access to "records indicating when the most recent updates to the utility allowances took place for the Section 8 voucher programs administered by the PHA." The Complainant fails to identify any specific type of record, such as memoranda, letters between specific parties, government publications, e-mails, etc. The Complainant's request requires an open-ended search of the PHA's files. Said request fails to identify with reasonable clarity the records sought.

Additionally, in item # 3 of the Complainant's request, the Complainant sought access to "any other utility allowance and surcharge schedules used or promulgated by the PHA that document the basis on which utility allowance and surcharge schedules and revisions thereof were established." Although the Complainant does identify a specific type of record in this particular item, *i.e.*, utility allowance and surcharge schedules, the Complainant fails to provide any other specific identifying information, such as a particular time period for said request. Additionally, the Complainant fails to describe how this request item differs from request item # 1 which sought access to utility allowance and surcharge scheduled used from February 2002 to present.

Further, in request item # 4, the Complainant sought access to "records and data from February 2002 to present that document the basis on which utility allowance and surcharge schedules and revisions thereof were established." Again, the Complainant fails to identify or name any specific records. Instead, the Complainant references various federal regulations that require specific data or records to be maintained.

The GRC has previously ruled on whether a request for records created pursuant to a particular statute is a valid request under OPRA. Specifically, in Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), the Complainant submitted numerous requests for records which may have been required to be created under federal rules. The Council held that:

"[b]ecause the Complainant's OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's 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 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)..."

The Council reasoned that:

"[w]hile some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant's requests cites to a definitional regulation rather than a regulation that requires the creation

of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, *the fact that the Custodian would have to research the federal regulations cited by the Complainant to determine whether said regulations require that a record be created places an undue burden on the Custodian.*” (Emphasis added).

Additionally, in Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Complainant sought access to the Passaic County Housing Agency signs posted in conformance with N.J.S.A. 47:1A-5.j., an OPRA provision which mandates that a custodian post a specific sign in his/her office. The Council stated that:

“[c]ustodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law.... However, the court cases listed above specifically state that a custodian is not required to conduct research in response to an OPRA request. The court in MAG, supra, does not qualify the extent of research custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. MAG, supra, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant’s request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute. Although the Public Information Officer ultimately provided the Complainant with the requested records, neither she nor the Custodian were required to conduct research in order to fulfill the Complainant’s requests.”

The Complainant appealed the Council’s decision that his OPRA request was invalid because it failed to identify with reasonable clarity the records sought. In Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009), the Appellate Division stated that:

“Bart’s request for documents required the Agency’s custodian of records to undertake some legal research and analysis in order to identify the signs to which Bart was referring in his request. [OPRA] does not, however, require that custodians of government records engage in legal research or consult an attorney in order to identify the records being requested. Bart was required to identify the records he requested with specificity. In our judgment, the GRC correctly found that he failed to do so.”

Similarly, in this instant complaint, the Custodian is not required to research the federal regulations cited by the Complainant in request item # 4 to determine which specific records the Complainant seeks.

Therefore, because items # 2-4 of the Complainant’s OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant’s

request requires an open-ended search of the PHA's files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, Schuler, supra, Taylor, supra, and Bart, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to items # 2-4 of 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 said request items 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 items # 2-4 of the Complainant's OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant's request requires an open-ended search of the Public Housing Authority's files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009).

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009