



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FINAL DECISION

January 26, 2010 Government Records Council Meeting

Steven Kossup
Complainant

Complaint No. 2009-133

v.

City of Newark (Essex)
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 2010 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. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian’s refusal to respond to the Complainant’s OPRA request on the grounds that the Complainant was barred from submitting OPRA requests to the City of Newark by court order also results in a “deemed” denial of the Complainant’s OPRA request and violates N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant’s request fails to seek specific identifiable government records, the Complainant’s request is overly broad and is therefore invalid under OPRA 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), Sallie, v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.



4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, 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 because the Complainant's request is invalid under 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 26th Day of January, 2010

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: January 29, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting**

**Steven Kossup¹
Complainant**

GRC Complaint No. 2009-133

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint: A certified true copy of any and all records regarding the purchase of motorcycles by the Newark Police Department from June 2004 through June 2005, including but not limited to records regarding motorcycles being damaged by falling debris at 36 Victoria Street Garage and any administrative reports completed by or addressed to Chief/Director Anthony Ambrose regarding the damage to said motorcycles.

Request Made: March 18, 2009

Response Made: No response given

Custodian: Joyce Lanier

GRC Complaint Filed: April 21, 2009³

Background

March 18, 2009

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.

April 21, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated March 18, 2009. The Complainant agrees to mediate this complaint.

May 15, 2009

Offer of Mediation sent to both parties. The Custodian failed to respond to the Offer of Mediation.

June 3, 2009

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

¹ No legal representation listed on record.

² Represented by Julien Neals, Esq. (Newark, NJ).

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

June 8, 2009

Custodian's SOI with the following attachments:

- Order of the Superior Court of New Jersey, Farina v. City of Newark et als., Docket No. ESX-L-2004-07, Law Division, Essex County, dated March 6, 2009;⁴
- Complainant's OPRA request dated March 18, 2009.

The Custodian certifies that she forwarded the Complainant's OPRA request to the Police and Finance Departments for response. The Custodian certifies that she has not received any records responsive to the Complainant's OPRA request. The Custodian indicated that she is still awaiting a response from the above mentioned departments. The Custodian argues that the Order of the Superior Court of New Jersey, Law Division, Essex County at Docket No. ESX-L-2004-07, dated March 6, 2009, bars the Complainant from serving further demands for discovery on the Custodian's agency without leave of the court. The Custodian further certifies that in reaching his decision in Farina v. City of Newark et als., Docket No. ESX-L-2004-07, the Hon. Eugene J. Cody, Jr., stated that pursuant to R. 4:10-2 and R. 4:10-3, the extensive discovery demands by the Complainant were burdensome and unreasonably cumulative and duplicative.

June 22, 2009

The Complainant's response to the Custodian's SOI. The Complainant states that it appears that the City of Newark is attempting to forego its obligation under OPRA by claiming that the requested records are exempt from disclosure as a result of the protective order issued in another matter. The Complainant states that he did not make any records requests in the matter of Farina v. City of Newark et als., Docket No. ESX-L-2004-07, nor did he make the OPRA request in the instant matter on behalf of a client. The Complainant states that the protective order in the matter of Farina v. City of Newark et als., prohibits discovery demands on the defendants in that action. The Complainant states that this is an OPRA request. The Complainant argues that the records requested are public records and therefore he is not bound by any protective order with respect to records requested under OPRA.

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:

⁴Farina v. City of Newark, Docket No. ESX-L-2004-07. This order bars the Complainant from serving upon the City of Newark any demands for discovery, interrogatories, request for admissions, notice in lieu of subpoena, or any other discovery device without leave of the court.
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“... 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 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 Complainant submitted his request to the Custodian on March 18, 2009. The evidence of record indicates that the Custodian did not respond to the Complainant’s request in the mistaken belief that by Order of the Superior Court of New Jersey, Farina v. City of Newark et als., Docket No. ESX-L-2004-07, Law Division, Essex County, dated March 6, 2009 the Complainant was barred from serving upon the City of Newark OPRA requests because said order barred the Complainant from submitting any demands for discovery, interrogatories, request for admissions, notice in lieu of subpoena, or any other discovery device without leave of the court.

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.⁵ 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).

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

⁵ 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.

“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).

Furthermore, in Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the City of Vineland sought a protective order precluding Mid-Atlantic from conducting discovery outside the limitations of the Federal Rules of Civil Procedure by requesting records under OPRA. In said case, the requestor, Mid-Atlantic, sought access to records under OPRA which were related to a law suit involving the parties. The court held that:

“...documents that are ‘government records’ and subject to public access under OPRA are no less subject to public access because the requestor filed a lawsuit against the governmental entity. The fact that a party may obtain documents through OPRA at an earlier time or that OPRA provides for a shorter time period to respond than the time when document requests are permitted to be served under Rule 26 [of the Federal Rules of Civil Procedure] does not create a conflict so as to deny a citizen of legal rights to seek governmental records under OPRA...”

Therefore, pursuant to Mid-Atlantic, *supra*, the Custodian’s refusal to respond to the Complainant’s OPRA request on the grounds that the Complainant was barred from submitting OPRA requests to the City of Newark by court order also results in a “deemed” denial of the Complainant’s OPRA request and violates N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Nevertheless, the Complainant’s request is invalid under OPRA. 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),⁶ 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.”⁷

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

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." *Id.* at 181. 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..." *Id.* at 182.

In Sallie, v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), the complainant sought access to any available record concerning complaint number 200700136 including but not limited to records from the Passaic County Surrogate Court and the Superior Court of New Jersey. The Council found that this blanket request for various documents was invalid under OPRA.

The request in the complaint currently before the Council closely resembles the request invalidated in Sallie, supra. The Complainant seeks access to "any and all records regarding the purchase of motorcycles by the Newark Police Department from June 2004 through June 2005." The Complainant further broadens his request by stating that the requested records include but are not limited to "records regarding motorcycles being damaged by falling debris at 36 Victoria Street Garage and any administrative reports completed by or addressed to Chief/Director." Like the request considered in Sallie, the Complainant's request does not seek a specific identifiable government record. Instead, the Complainant seeks access to every record in the agency's possession that concerns the purchase of motorcycle from June 2004 through June 2005, motorcycles damaged by falling debris or administrative reports completed by or addressed to Chief/Director. The Complainant's request is therefore a blanket request for a class of various documents rather than a request for a specific government record. Pursuant to Bent, supra, "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." *Id.* at 37. Furthermore, in Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), "the request may not be a broad, generic description of documents."

Therefore, because the Complainant's request fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Sallie, v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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, 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 because the Complainant’s request is invalid under OPRA since it is an overly broad request.

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. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's refusal to respond to the Complainant's OPRA request on the grounds that the Complainant was barred from submitting OPRA requests to the City of Newark by court order also results in a "deemed" denial of the Complainant's OPRA request and violates N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant's request fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA 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), Sallie, v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, 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 because the Complainant's request is invalid under OPRA.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010