



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

August 24, 2010 Government Records Council Meeting

Steven R. Maness
Complainant

Complaint No. 2009-192

v.

Borough of Sayreville (Middlesex)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 17, 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 the Complainant’s letter request is invalid under OPRA because the Complainant failed to specifically identify that said request was being made pursuant to OPRA and further failed to include even a tangential mention of OPRA or N.J.S.A. 47:1A-1 et seq. See Walker v. New Jersey Department of Treasury, Division of Purchase and Property, GRC Complaint No. 2008-44 (November 2008).

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 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council



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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**Steven R. Maness¹
Complainant**

GRC Complaint No. 2009-192

v.

**Borough of Sayreville (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: All documents, reports, correspondence (including e-mails) and police records of the investigation and all of the facts regarding the Borough of Sayreville's ("Borough") disposition of Fort Grumpy incident.

Request Made: April 15, 2009

Response Made: None

Custodian: Theresa Farbaniec³

GRC Complaint Filed: June 2, 2009⁴

Background

April 15, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing New Jersey "Sunshine" laws.

June 2, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's letter request dated April 15, 2009.⁵

The Complainant states that he submitted a letter request referencing New Jersey "Sunshine" laws to Mr. Jeff Bertrand ("Mr. Bertrand"), Borough Administrator, and Mayor Kenny O'Brien ("Mayor O'Brien") on April 15, 2009. The Complainant states that he never received a response to his request.

The Complainant agrees to mediate this complaint.

¹ No legal representation listed on record.

² Represented by Judy A. Verrone, Esq., of DeCotiis, Fitzpatrick, Cole & Wisler (Teaneck, NJ).

³ Jeff Bertrand was named on the complaint.

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

⁵ The Complainant submitted additional documents that predate the submission of his letter request.

July 22, 2009

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

August 20, 2009

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

September 14, 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 a Statement of Information on August 20, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

September 16, 2009

Custodian’s SOI with the following attachments:

- Complainant’s letter request referencing New Jersey “Sunshine” laws dated April 15, 2009.
- Letter from Mr. Jeffry L. Bertrand (“Mr. Bertrand”), Borough Administrator to the Complainant dated April 27, 2009.⁶

The Custodian certifies that she is unaware of a specific OPRA request submitted by the Complainant.

The Custodian argues that at no time did the Complainant direct any correspondence to the Custodian or indicate that he was seeking access to records under OPRA. The Custodian argues that the instant complaint appears to be the result of nearly six (6) months of correspondence between the Complainant and Mr. Bertrand regarding an alleged incident at Fort Grumpy.

The Custodian states that on April 15, 2009, Mr. Bertrand received two (2) letters from the Complainant. The Custodian states that the letter relevant to the instant complaint accused Mr. Bertrand of covering up alleged misconduct and other disparaging comments. The Custodian states that in the middle of the letter, the Complainant stated the following:

“In accordance with your failure to be transparent and forthcoming, I hereby request a copy of any and all documents, reports, correspondence (including e-mails), police records of the investigation and all of the facts regarding the Borough’s disposition of [the Fort Grumpy complaint] – sought under the common law right of access to public records, as per [the Freedom of Information Act] (“F.O.I.A.”) and applicable “Sunshine” laws.”

⁶ The Custodian submitted additional correspondence that predates or is not relevant to the submission of Complainant’s letter request.

The Custodian argues that the Complainant did not state that he was requesting records pursuant to OPRA, nor did the Complainant submit an official OPRA request form to the Custodian.

The Custodian alleges that Mr. Bertrand did not recognize the Complainant's demands for public records as an OPRA request in part because the above paragraph was sandwiched between pages of *ad hominem* attacks and because the letter was just another correspondence in a chain dating back to November 2008. The Custodian avers that because of the foregoing factors, Mr. Bertrand did not forward the Complainant's letter to the Custodian or treat it as an OPRA request. The Custodian states that Mr. Bertrand instead responded to the Complainant on April 27, 2009 stating that the information provided to the Detective Bureau was insufficient to warrant action against any employee at Fort Grumpy. The Custodian states that Mr. Bertrand further advised that he had directed a modification of the record keeping and review of activities at Fort Grumpy as a result of the Complainant's allegations. The Custodian asserts that Mr. Bertrand considered the matter closed after not receiving a response from the Complainant.

The Custodian certifies that following receipt of the instant complaint, the Custodian's search undertaken to locate records responsive included questioning Mr. Bertrand and the Police Department regarding the Fort Grumpy investigation. The Custodian certifies that Mr. Bertrand and the Police Department also searched their files to determine what records responsive, if any, existed.

The Custodian certifies that no records responsive to any request 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 contends that the Complainant's vague request for "...all documents, reports, correspondence (including e-mails), police records..." is overly broad and unclear. The Custodian argues that both OPRA and previous case law are clear that a request made pursuant to OPRA must specify an identifiable government record. *See* Bart v. Passaic County Public Housing Authority, 406 N.J. Super. 445, 451 (App. Div. 2009). The Custodian states that in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), the court held that:

"OPRA ... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information ... Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein." *Id.* at 546-549.

The Custodian argues that because the Complainant failed to identify any specific records and instead demanded that the Borough conduct research to locate the records responsive, the Custodian was not obligated to comply with said request. The Custodian argues that the foregoing also applies to Complainant's request for "all facts..." regarding the Fort Grumpy investigation.

The Custodian acknowledges that in the recent Appellate Division decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the court held that OPRA requests need not be submitted on an agency's official form. The Custodian further acknowledges that at the time Mr. Bertrand received the Complainant's letter referencing "Sunshine" laws, the issue of valid OPRA requests was governed by GRC Advisory Opinion No. 2006-01. The Custodian states that Advisory Opinion No. 2006-01 advised that only requests submitted on an agency's OPRA form are valid OPRA requests. The Custodian states that the Appellate Division noted in Renna, *supra*:

"[i]n the opinion, the GRC acknowledged that it had previously "taken the position that public agencies must accept OPRA requests, even when they are not submitted on the public agency's official OPRA records request form[.]" but that it had decided to change this policy due to practical problems agencies experienced without a form. The GRC noted "[m]any agencies grant non-OPRA requests for such documents as building inspection reports," however, some had "experienced difficulty in distinguishing between non-OPRA requests" and OPRA requests, which require a response within certain time frames. In addition, the agencies were concerned that "vague or unspecific records requests, usually associated with the use of a non-official OPRA request form," would cause employees to respond in an untimely fashion and risk being penalized under OPRA. After a discussion of the applicable statutory and case law, the GRC concluded that "the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form" and "[w]hen an agency has not adopted its own official OPRA records request form, requestors may submit their records request on the Model Request Form located on the Government Records Council website." *Id.* at 233.

The Custodian argues that the instant complaint provides an exceptional illustration of the court's discussion of Advisory Opinion No. 2006-01. The Custodian reiterates that the Complainant's alleged request was not submitted on the Borough's official OPRA request form, nor did the Complainant submit any correspondence to the Custodian. The Custodian avers that the Complainant's letter dated April 15, 2009 referenced common law, F.O.I.A. and applicable New Jersey "Sunshine" laws, more commonly referred to as the Open Public Meetings Act ("OPMA"). The Custodian argues that based on the totality of the circumstances of this complaint, the Borough could not reasonably identify the Complainant's letter dated April 15, 2009 as an OPRA request. The Custodian notes that the Complainant did not classify his letter dated April 15, 2009 as an OPRA request, instead choosing to identify the date of the request in his Denial of Access complaint as "prior to Feb. 27."⁷

⁷ The Custodian argues that if the Complainant's request was indeed filed prior to February 27, 2009, this complaint would have been filed beyond the 45 day statute of limitation imposed in Mason v. City of Hoboken, 196 N.J. 51, 70 (2008) and would be subject to dismissal as untimely. The GRC notes that OPRA allows for a requestor to file a complaint regarding access to government records with either the Law Division of the Superior Court of New Jersey or the GRC. If a requestor chooses to file a complaint in Superior Court, said requestor must do so within forty-five (45) days of the denial of access. The forty-five (45) day filing period does not apply to complaints filed with the GRC, which has no statute of limitations. Steven R. Maness v. Borough of Sayreville (Middlesex), 2009-192 – Findings and Recommendations of the Executive Director

The Custodian contends that had the Complainant submitted his letter or a request on the official OPRA request form to the Custodian, his request would have been treated as an official OPRA request. The Custodian asserts that the Complainant would have received everything he has received; however, the Complainant would have also been provided with a proper response, as required by OPRA.

The Custodian states that, *arguendo*, if the Complainant's letter dated April 15, 2009 constituted a valid OPRA request, the Complainant sought:

1. a copy of any and all documents, reports, correspondence (including e-mails), police records of the investigation, and;
2. all of the facts regarding the Borough's disposition of this complaint.

The Custodian certifies that attached to the SOI is a series of written communications between Borough officials and the Complainant that would be responsive to Item No. 1 above. The Custodian certifies that all of the attached documents were previously disclosed to the Complainant. The Custodian certifies that the only other record that would be responsive to Item No. 1 is a one (1) page document containing handwritten criminal investigatory notes prepared by the police officer assigned to investigate the alleged Fort Grumpy incident. The Custodian contends that this record is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

The Custodian contends that Item No. 2 is not a request for a record, but a request for information and is therefore invalid under OPRA. *See Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005)(holding that, "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.").

The Custodian states that OPRA provides that, "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. The Custodian contends that because the denial of the record not provided to the Complainant was appropriate, any "deemed" denial that occurred was a simple oversight. Further, the Custodian argues that because the Complainant's letter dated April 15, 2009 could not reasonably be identified as an OPRA request, any failure to treat the letter as such does not rise to a level of a knowing and willful violation.

The Custodian reiterates that the Complainant's April 15, 2009 letter referencing applicable New Jersey "Sunshine" laws is not a valid OPRA request. The Custodian contends that even if the request were valid, no records subject to disclosure were withheld from the Complainant. The Custodian requests that this complaint be dismissed.⁸

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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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 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 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.

The Complainant in this complaint submitted a letter requesting records and facts concerning the Fort Grumpy investigation to Mr. Bertrand on April 15, 2009 referencing the common law right of access to public records, as per F.O.I.A. and applicable “Sunshine” laws. Said letter did not make any specific reference to OPRA or N.J.S.A. 47:1A-1 et seq. Mr. Bertrand responded in writing to the Complainant on April 27, 2009 stating that no action was taken in response to the Fort Grumpy investigation and that a modification of the record keeping and review of activities at Fort Grumpy as a result of the Complainant’s allegations had been made. Mr. Bertrand’s response letter also did not refer in any way to OPRA or N.J.S.A. 47:1A-1 et seq.

The main issue in this complaint is whether the Complainant's letter constitutes a valid OPRA request. In Walker v. New Jersey Department of Treasury, Division of Purchase and Property, GRC Complaint No. 2008-44 (November 2008), the Complainant submitted a letter request dated January 30, 2008 to the Custodian that cited to OPRA in the first paragraph, references several previous non-OPRA requests and mentions that the Complainant's client was denied access to "two (2) government records which he is entitled to copies of pursuant to N.J.S.A. 47:1A-1."

In the SOI, the Custodian certified that no OPRA request was ever received and that the documentation provided by the Complainant as part of the Denial of Access complaint contains requests for records, but does not invoke OPRA. The Custodian argued that GRC Advisory Opinion 2006-01 states that in order for an OPRA request to be valid, the request must be submitted on an official form. The Custodian argued that because the Complainant did not use either the official NJDOT OPRA request form or the GRC's model request form this complaint should be dismissed.

The Council, tasked with determining whether the Complainant's letter request was a valid request under OPRA, found that the letter contained tangential references to OPRA. Based on these references, the Council held that:

"[t]he Complainant's January 30, 2008 OPRA request states that the Complainant's client was denied access to "two (2) government records which he is entitled to copies of pursuant to N.J.S.A. 47:1A-1." Additionally, the Complainant goes on to state that he is requesting these records. Therefore, the Complainant's January 30, 2008 letter should be considered an OPRA request because OPRA is explicitly implicated by the Complainant's reference to N.J.S.A. 47:1A-1 in his letter."

The facts of Walker are inapposite to the matter currently before the Council.

First, the Complainant's letter request cites to the common law right of access to public records, as per F.O.I.A. and applicable "Sunshine" laws. Pursuant to N.J.S.A. 47:1A-7.b., the GRC has no jurisdiction over matters derived from common law and F.O.I.A.⁹ Further, as noted by the Custodian in the SOI, the appellation "Sunshine laws" is a generic term understood to apply to the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.). See e.g. Polillo v. Deane, 74 N.J. 562 (1977). There is no statute or law in the State of New Jersey that is officially titled the "Sunshine law." Second, the Complainant's letter request makes no reference to OPRA or N.J.S.A. 47:1A-1 et seq., as was the case in Walker.

Based on the foregoing, the Complainant's letter request is invalid under OPRA because the Complainant failed to specifically identify that said request was being made pursuant to OPRA and further failed to include even a tangential mention of OPRA or N.J.S.A. 47:1A-1 et seq. See Walker, supra.

⁹ The GRC narrowly applies a common law balancing test in those complaints where possible violation of a citizen's reasonable expectation of privacy is at issue.
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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.”

The Complainant's letter request in this complaint predates Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) in which the Appellate Division held that although requestors shall continue to use public agencies' OPRA request forms when making requests, 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 the section of OPRA requiring custodians to adopt a form. Renna was decided on May 21, 2009. The GRC declines to retroactively apply the Appellate Division's decision in Renna to the instant matter pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). However, the GRC notes that even if the court's holding in Renna applied to this request, same would still be invalid under OPRA because it fails to meet the court's standard of including the requisite information prescribed in N.J.S.A. 47:1A-5.f.¹⁰

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's letter request is invalid under OPRA because the Complainant failed to specifically identify that said request was being made pursuant to OPRA and further failed to include even a tangential mention of OPRA or N.J.S.A. 47:1A-1 et seq. See Walker v. New Jersey Department of Treasury, Division of Purchase and Property, GRC Complaint No. 2008-44 (November 2008).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 17, 2010

¹⁰ It should be noted that the Complainant's request for "any and all documents, reports ..." and "all the facts ..." is an overly broad request for a universe of records instead of a specific, identifiable government record. See JLB v. Somerset County Prosecutor's Office, GRC Complaint No. 2008-205 (June 2009).
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