



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

February 23, 2010 Government Records Council Meeting

Stephen Biss
Complainant

Complaint No. 2009-21

v.

Borough of New Providence
Police Department (Union)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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 under the state of the law at the time of the Complainant’s request dated December 11, 2008, the Complainant’s request was not a valid OPRA request because the Complainant failed to submit said request on the Borough’s official OPRA request form. N.J.S.A. 47:1A-5.g.; MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005); and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005). Therefore, the Custodian did not unlawfully deny the Complainant access to the records requested.

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 23rd Day of February, 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: March 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Stephen Biss¹
Complainant**

GRC Complaint No. 2009-21

v.

**Borough of New Providence Police Department (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of complaints filed by Heather Heravi from June 1, 2004 to August 31, 2004.
2. Copies of complaints against Jevin Torres from June 1, 2004 to August 31, 2004.

Request Made: December 11, 2008

Response Made: December 22, 2008

Custodian: Edward Catallo³

GRC Complaint Filed: January 6, 2009⁴

Background

December 11, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter that refers to OPRA.

December 22, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that the Complainant's OPRA request is denied because it is not on the official Borough of New Providence ("Borough") OPRA request form. The Custodian requests that the Complainant submit his request on the enclosed official OPRA request form adopted by the New Providence Police Department.

¹ No legal representation listed on record.

² Represented by Carl Woodward, Esq., of Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein (Roseland, NJ).

³ Edward Catallo, the Custodian at the time the denial of access occurred has retired and been replaced by Eric Nobbs.

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

December 29, 2008

Letter from the Complainant to the Custodian. The Complainant states that he disagrees with the Custodian's position that the Complainant's records request cannot be processed until the Complainant completes an official OPRA request form. The Complainant further states that he is enclosing a completed copy of the OPRA request form. The Complainant maintains that the GRC has made it clear that requests not submitted on standard forms should still be treated as valid OPRA request. The Complainant further states that the Custodian may want to consider making the official OPRA request form available on the Borough of New Providence Police Department website or permit members of the New Providence Police Department to fax the OPRA request form to requestor. The Complainant also states that prior to submitting his original letter request, he contacted the New Providence Police Department to request a copy of the official OPRA request form be faxed to him.

January 5, 2009

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

- Complainant's OPRA request dated December 11, 2008;
- Letter from the Custodian to the Complainant dated December 22, 2008; and
- Letter from the Complainant to the Custodian dated December 29, 2008 (with a completed OPRA request form attached).

The Complainant states that he searched the Borough of New Providence Police Department's website for an OPRA request form but was unable to find one. The Complainant further states that his request to have an OPRA request form faxed to him was denied.

Subsequently, the Complainant states that he submitted a letter request by mail. The Complainant states that on December 29, 2008,⁵ the Custodian denied the Complainant access to the records requested based on the Complainant's failure to use the agency's OPRA request form.

The Complainant agrees to mediate this complaint.

February 5, 2009

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

May 4, 2009

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

⁵ Although the Complainant alleges that the denial of access occurred on December 29, 2008, the evidence of records indicates that the denial of access occurred on December 22, 2008, the date upon which the Custodian responded to the Complainant's letter request.
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May 7, 2009

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel requests that the SOI filing deadline be extended until May 15, 2009.

May 7, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that pursuant to his conversation with the GRC, the deadline for filing the SOI is extended until May 15, 2009.

May 15, 2009

Telephone call from the Custodian's Counsel to the GRC. The Custodian's Counsel requests that the SOI filing deadline be extended until May 22, 2009.

May 15, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel states that pursuant to his conversation with the GRC, the deadline for filing the SOI is extended until May 22, 2009.

May 28, 2009

Letter from the GRC to the Custodian. The GRC states that the GRC provided the Custodian with a request for a SOI on May 4, 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.

Analysis

Whether the Complainant's request constituted a valid OPRA request at the time it was submitted to the New Providence Police Department?

The Custodian responded in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of said request denying the Complainant's request because it was not on the Borough's official OPRA request form. The Custodian requested that the Complainant resubmit his request using the Borough's official records request form. The Complainant disagreed with the Custodian, maintaining that the GRC has ruled that custodians should treat requests not submitted on official OPRA records request forms as valid OPRA requests.

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

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;

- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

Id.

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

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

If the custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof.* (Emphasis added.)
N.J.S.A. 47:1A-5.g.

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

express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

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.

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

It should be noted that the Council takes cognizance of the Appellate Division's recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), Docket No. A-0821-07T2. In Renna, the Appellate Division held that:

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

Renna was decided on May 21, 2009, more than five (5) months after this complaint was filed. Therefore, for the Renna decision to be considered in this matter it will have to be retroactively applied.

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

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

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

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

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

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

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

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

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

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

The state of the law at the time of the Complainant’s request required custodians to direct requestors to the agency’s official OPRA request form when denying a letter request on the basis that said request was not submitted on an official request form. The Custodian responded to the Complainant’s OPRA request on the seventh (7th) business day requesting that the Complainant submit his records request on the Borough’s official OPRA form. The Custodian also enclosed a copy of said form. Therefore, the Custodian fulfilled his legal obligations as they existed at the time of the request.

Under the state of the law at the time of the Complainant’s request of December 11, 2008, the Complainant’s request was not a valid OPRA request because the Complainant failed to submit said request on the Borough’s official OPRA request form. N.J.S.A. 47:1A-5.g.; MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005); and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005). Therefore, the Custodian did not unlawfully deny the Complainant access to the records requested.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that under the state of the law at the time of the Complainant's request dated December 11, 2008, the Complainant's request was not a valid OPRA request because the Complainant failed to submit said request on the Borough's official OPRA request form. N.J.S.A. 47:1A-5.g.; MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005); and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005). Therefore, the Custodian did not unlawfully deny the Complainant access to the records requested.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010