



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Joseph Ingemi
Complainant

Complaint No. 2009-265

v.

Town of Hammonton (Atlantic)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental 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, accepts the Administrative Law Judge’s Initial Decision dated December 16, 2011, which concludes:

“...[T]he Town of Hammonton, including it’s (sic) paid and volunteer agents or representatives did not knowingly, willfully or unreasonably deny petitioner access to official government records. The August 27, 2009 OPRA request submitted by petitioner sought a document that did not exist. Petitioner asserts that, at a minimum, the receipt for the appropriation or earmark should have been produced in conjunction with his August 27, 2009, request. However, the request specifically seeks an application submitted to the Department of Housing and Urban Development. The receipt for the appropriation was submitted to Senator Lautenberg and was a request for earmark or appropriation. Even if petitioner’s request is read in the broadest light, Hammonton cannot be held to have willfully, knowingly or unreasonably denied petitioner access to a public document.”

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 31st Day of January, 2012



Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Joseph Ingemi¹
Complainant**

GRC Complaint No. 2009-265

v.

**Town of Hammonton (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

Request dated July 31, 2009

1. Copies of all minutes from any meeting to include committees and conversations pertaining to the Richard Stockton College of New Jersey's ("Stockton") location of a campus in Hammonton.
2. Any correspondence and earmark request between Hammonton and Congressional delegations, State and County representatives and Stockton officials.
3. Logs of and notes from conversations, internal and external, pertaining to Stockton.

Request dated August 27, 2009

Copy of the Economic Development Initiative application to the Department of Housing and Urban Development ("HUD") filed by the Downtown Advocate.

Requests Made: July 31, 2009 and August 27, 2009

Responses Made: August 12, 2009 and September 1, 2009

Custodian: April Maimone

GRC Complaint Filed: September 25, 2009³

Background

November 30, 2010

At the November 30, 2010 public meeting, the Government Records Council ("Council") considered the November 23, 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, found that:

¹ No legal representation listed on record.

² Represented by Brian Howell, Esq. (Hammonton, NJ).

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

1. The Custodian's failure to respond in writing to the Complainant's OPRA requests 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's July 31, 2009 request fails to identify with reasonable clarity the records sought and because fulfilling such a request would require research which the Custodian is not obligated to conduct, said request is invalid 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), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied access to the records sought in the Complainant's July 31, 2009 OPRA request.
3. Based on the inadequate evidence presented in this matter, the GRC is unable to determine whether a municipal official may have unlawfully denied access to the record responsive to the Complainant's August 27, 2009 request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether a municipal official did unlawfully deny access to the record responsive to the Complainant's August 27, 2009 request, and if so, for a further determination of whether such municipal official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

December 3, 2010

Council's Interim Order distributed to the parties.

May 2, 2011

Complaint forwarded to the Office of Administrative Law ("OAL").

December 16, 2011

Administrative Law Judge's Initial Decision. The Administrative Law Judge ("ALJ"), after reviewing the procedural history and facts of the complaint, determined in relevant part that:

"In the present matter, it is undisputed that petitioner's OPRA request for the "Economic Development Initiative Application to HUD filed by the Downtown Advocate" was submitted to Hammonton on August 27, 2009. The record is abundantly clear that no such application existed as of August 27, 2009. The only record that was in the possession of the Town of Hammonton or its volunteer committees was a receipt for an appropriation or earmark dated February 27, 2009 (citation omitted). Petitioner's request did not include a request for receipts for earmarks or

appropriations. The “formal application” for the EDI grant was not submitted until September 15, 2010 (citation omitted). I so **FIND**.

Based upon the foregoing, I **CONCLUDE** that the Town of Hammonton, including its (sic) paid and volunteer agents or representatives did not knowingly, willfully or unreasonably deny petitioner access to official government records. The August 27, 2009 OPRA request submitted by petitioner sought a document that did not exist. Petitioner asserts that, at a minimum, the receipt for the appropriation or earmark should have been produced in conjunction with his August 27, 2009, request. However, the request specifically seeks an application submitted to the Department of Housing and Urban Development. The receipt for the appropriation was submitted to Senator Lautenberg and was a request for earmark or appropriation. Even if petitioner’s request is read in the broadest light, Hammonton cannot be held to have willfully, knowingly or unreasonably denied petitioner access to a public document.”

Analysis

Whether the GRC should adopt, modify or reject the ALJ’s Initial Decision dated December 16, 2011?

The ALJ’s findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties.

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavaliere v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there,

the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. As such, the Council finds that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council accepts the ALJ's Initial Decision dated December 16, 2011, which concludes:

"...[T]he Town of Hammonton, including it's (sic) paid and volunteer agents or representatives did not knowingly, willfully or unreasonably deny petitioner access to official government records. The August 27, 2009 OPRA request submitted by petitioner sought a document that did not exist. Petitioner asserts that, at a minimum, the receipt for the appropriation or earmark should have been produced in conjunction with his August 27, 2009, request. However, the request specifically seeks an application submitted to the Department of Housing and Urban Development. The receipt for the appropriation was submitted to Senator Lautenberg and was a request for earmark or appropriation. Even if petitioner's request is read in the broadest light, Hammonton cannot be held to have willfully, knowingly or unreasonably denied petitioner access to a public document."

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge's Initial Decision dated December 16, 2011, which concludes:

"...[T]he Town of Hammonton, including it's (sic) paid and volunteer agents or representatives did not knowingly, willfully or unreasonably deny petitioner access to official government records. The August 27, 2009 OPRA request submitted by petitioner sought a document that did not exist. Petitioner asserts that, at a minimum, the receipt for the appropriation or earmark should have been produced in conjunction with his August 27, 2009, request. However, the request specifically seeks an application submitted to the Department of Housing and Urban Development. The receipt for the appropriation was submitted to Senator Lautenberg and was a request for earmark or appropriation. Even if petitioner's request is read in the broadest light, Hammonton cannot be held to have willfully, knowingly or unreasonably denied petitioner access to a public document."

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

INTERIM ORDER

November 30, 2010 Government Records Council Meeting

Joseph Ingemi
Complainant

Complaint No. 2009-265

v.

Town of Hammonton (Atlantic)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 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 requests 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s July 31, 2009 request fails to identify with reasonable clarity the records sought and because fulfilling such a request would require research which the Custodian is not obligated to conduct, said request is invalid 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), and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied access to the records sought in the Complainant’s July 31, 2009 OPRA request.
3. Based on the inadequate evidence presented in this matter, the GRC is unable to determine whether a municipal official may have unlawfully denied access to the record responsive to the Complainant’s August 27, 2009 request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether a municipal official did unlawfully deny access



to the record responsive to the Complainant's August 27, 2009 request, and if so, for a further determination of whether such municipal official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 30th Day of November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Joseph Ingemi¹
Complainant**

GRC Complaint No. 2009-265

v.

**Town of Hammonton (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

Request dated July 31, 2009

1. Copies of all minutes from any meeting to include committees and conversations pertaining to the Richard Stockton College of New Jersey's ("Stockton") location of a campus in Hammonton.
2. Any correspondence and earmark request between Hammonton and Congressional delegations, State and County representatives and Stockton officials.
3. Logs of and notes from conversations, internal and external, pertaining to Stockton.

Request dated August 27, 2009

Copy of the Economic Development Initiative application to the Department of Housing and Urban Development ("HUD") filed by the Downtown Advocate.

Requests Made: July 31, 2009 and August 27, 2009

Responses Made: August 12, 2009 and September 1, 2009

Custodian: April Maimone

GRC Complaint Filed: September 25, 2009³

Background

July 31, 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.

¹ No legal representation listed on record.

² Represented by Brian Howell, Esq. (Hammonton, NJ).

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

July 31, 2009

E-mail from the Custodian to Councilwoman Tracy Petrongolo. The Custodian asks Ms. Petrongolo if she can provide any information to the Custodian regarding the Complainant's OPRA request.

August 3, 2009

E-mail from Councilwoman Petrongolo to the Custodian. Councilwoman Petrongolo informs the Custodian that the information requested regarding location was announced in Councilwoman Petrongolo's Business and Industry Report.

August 11, 2009

E-mail from the Custodian to Solicitor Brian Howell. The Custodian directs Mr. Howell to an attached copy of the Complainant's OPRA request. The Custodian informs Mr. Howell that she requested information from Councilwoman Petrongolo regarding the request; however the Custodian states that Ms. Petrongolo just referred the Custodian to a Council committee report. The Custodian advises Mr. Howell that she subsequently asked Councilwoman Petrongolo to direct her to the person handling the grant application because the Custodian believes a copy of the grant application is maintained by the municipality; however, the Custodian informs Mr. Howell that Councilwoman Petrongolo never replied back to her. The Custodian asks Mr. Howell for guidance in responding to the Complainant's OPRA request.⁴

August 12, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of the request. The Custodian refers the Complainant to copies of attached pages from *The Hammonton Gazette* (newspaper), Hammonton Board of Education meeting minutes and Hammonton Council meeting minutes. The Custodian states that she did not attend the meeting. The Custodian attaches copies of Hammonton Board of Education meeting minutes dated July 29, 2008, Hammonton Council meeting minutes dated July 27, 2009 and page one (1), page three (3) and page fourteen (14) of *The Hammonton Gazette* dated August 5, 2009. The Custodian marks with an arrow a portion of the Council meeting minutes which states "Business and Industry-Councilperson Petrongolo-Report on receipt of Federal funding for Stockton/Hammonton Project."⁵

August 25, 2009

E-mail from the Custodian to the Complainant, Mayor John DiDonato, Councilwoman Tracy Petrongolo, Clerk Frank Zuber, Clerk Susanne Oddo and Solicitor Brian Howell. The Custodian states that she believes the record responsive to the Complainant's OPRA request is the complete application for the Stockton/Hammonton grant. The Custodian states that she e-mailed every person previously inquiring how she could obtain information on the Stockton/Hammonton grant application for the Complainant. The Custodian states that there was a report regarding a grant so there must also be a grant application. The Custodian also states that Ms. Oddo and Mr. Zuber looked on the State grant application website; however, they found no information there

⁴ There is nothing in the evidence of record to indicate that the e-mail recipient replied to the Custodian's request contained in this e-mail.

⁵ The Custodian's response was divided between two (2) separate e-mails dated August 12, 2009.
Joseph Ingemi v. Town of Hammonton (Atlantic), 2009-265 – Findings and Recommendations of the Executive Director

concerning the grant application that the Complainant is seeking. The Custodian asks the Complainant for clarification regarding the Stockton/Hammonton grant application segment of his OPRA request. The Custodian also asks if any of the e-mail recipients know where she can obtain the Stockton/Hammonton grant application so it can be provided to the Complainant.⁶

August 27, 2009

Complainant's Open Public Records Act ("OPRA") request.⁷ The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 27, 2009

E-mail from the Custodian to Mayor John DiDonato and all Hammonton Councilmen and Councilwomen. The Custodian provides a copy of the Complainant's OPRA request to the Mayor and Council and asks if the Mayor or any member of Council can direct her to a copy of the Economic Development Initiative application sent to HUD. The Custodian also asks for the identity of the Downtown Advocate.⁸

September 1, 2009

E-mail from the Custodian to Mayor John DiDonato and all Hammonton Councilmen and Councilwomen. The Custodian again asks if the Mayor or any member of Council can direct her to a copy of the Economic Development Initiative application so that she can disclose it to the Complainant.⁹

September 1, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of the request. The Custodian states that the Mayor and Council have discussed grant funding and the Custodian informs the Complainant that she has therefore sent the Complainant's records request to the Mayor and Council with a copy to the Solicitor. The Custodian also informs the Complainant that she asked the Mayor and Council (a) where she can locate the grant application for the Stockton project, and (b) to identify the Downtown Advocate. The Custodian states that she has made two (2) requests of the Mayor and Council for this information. The Custodian advises the Complainant that she will further respond to his request as soon as the Mayor and Council answer her inquiries.

September 2, 2009

E-mail from the Custodian to Mayor DiDonato. The Custodian forwards a copy of the Complainant's OPRA request to the Mayor. The Custodian informs the Mayor that Frank Zuber and Susanne Oddo in the Clerk's Office informed the Custodian that

⁶ There is nothing in the evidence of record to indicate that any of the e-mail recipients replied to the Custodian's requests contained in this e-mail.

⁷ The Complainant in his complaint states that he filed his second OPRA request on September 1, 2009; however, the OPRA request attached to the Custodian's Statement of Information indicates the Complainant's second OPRA request was received on August 27, 2009.

⁸ There is nothing in the evidence of record to indicate that any of the e-mail recipients replied to the Custodian's requests contained in this e-mail.

⁹ There is nothing in the evidence of record to indicate that any of the e-mail recipients replied to the Custodian's requests contained in this e-mail.

they do not have a copy of the grant application and therefore there is no record responsive to the Complainant's request. The Custodian requests that the Mayor and Council (the Custodian copied the Council members with this e-mail) inform the Custodian where she can find a copy of the grant application.

September 25, 2009

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

- Two (2) page copy of Hammonton Board of Education meeting minutes dated July 29, 2008
- Complainant's OPRA request dated July 31, 2009
- Page one (1), page three (3) and page fourteen (14) of *The Hammonton Gazette* (newspaper) dated August 5, 2009
- Complainant's OPRA request dated August 27, 2009
- Custodian's written response to the Complainant's August 27, 2009 OPRA request dated September 1, 2009

The Complainant states that in late July of 2009, the House of Representatives approved two hundred fifty thousand dollars (\$250,000.00) for the development of a satellite campus in Hammonton for the Richard Stockton College of New Jersey. The Complainant states that on July 31, 2009 he requested the records relevant to this complaint but received non-responsive records; to wit, school board meeting minutes from 2008 and newspaper clippings. The Complainant states that on September 1, 2009 (sic), he filed an OPRA request for the Economic Development Initiative application but never received it.

The Complainant does not agree to mediate this complaint.

October 5, 2009

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

October 6, 2009

Custodian's SOI with the following attachments:

- Two (2) page copy of Hammonton Board of Education meeting minutes dated July 29, 2008
- Copies of two (2) pages from the Hammonton Council meeting minutes dated July 27, 2009¹⁰
- Complainant's OPRA request dated July 31, 2009
- E-mail from the Custodian to Councilwoman Tracy Petrongolo dated July 31, 2009
- E-mail from Councilwoman Petrongolo to the Custodian dated August 3, 2009
- Page one (1), page three (3) and page fourteen (14) of *The Hammonton Gazette* (newspaper) dated August 5, 2009
- E-mail from the Custodian to Solicitor Brian Howell dated August 11, 2009

¹⁰ The two pages are page number one (1) and page number three (3).

- Custodian's written response to the Complainant's July 31, 2009 OPRA request dated August 12, 2009
- E-mail from the Custodian to the Complainant, Mayor John DiDonato, Councilwoman Tracy Petrongolo, Clerk Frank Zuber, Clerk Susanne Oddo and Solicitor Brian Howell dated August 25, 2009
- Complainant's OPRA request dated August 27, 2009
- E-mail from the Custodian to Mayor John DiDonato and all Councilmen and Councilwomen dated August 27, 2009
- E-mail from the Custodian to Mayor John DiDonato and all Councilmen and Councilwomen dated September 1, 2009
- E-mail from the Custodian to Mayor DiDonato dated September 2, 2009

The Custodian does not certify as to the type of search conducted to locate the requested records; however, the Custodian does attach several e-mails to the SOI which indicate that the Custodian attempted to locate the whereabouts of the requested records by inquiring with several persons responsible for administration of the municipality. The Custodian also does not certify the last date upon which records that may have been responsive to the 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.

The Custodian certifies that she attempted to respond to the Complainant's OPRA request by locating the Stockton/Hammonton grant application. The Custodian certifies that Frank Zuber and Susanne Oddo in the Clerk's Office receive and retain all grant information; however the Custodian certifies that Mr. Zuber and Ms. Oddo informed her that they do not have a grant application responsive to the Complainant's request. The Custodian further certifies that Mr. Zuber and Ms. Oddo informed the Custodian that any grant applications would be filed in the shared office of the Clerk, Finance Office and Business Administrator. The Custodian certifies that the Municipal Solicitor, Brian Howell, informed her that the grant application responsive to the Complainant's request was prepared on-line and that a copy was not made or retained.¹¹

October 6, 2009

E-mail from the GRC to the Custodian. The GRC informs the Custodian that her SOI is deficient because it does not address all four (4) items that were contained in the Complainant two (2) OPRA requests. The GRC also informs the Custodian that she failed to include page three (3) of the SOI and did not answer Questions No. 7 and No. 8. The GRC also informs the Custodian that the document index is not accurate because the Custodian described the e-mails she sent to municipal employees in her effort to locate the records requested by the Complainant instead of the records responsive to the Complainant's request.

October 6, 2009

E-mail from the Custodian to the GRC. The Custodian states that she disagrees that her SOI was deficient and states that the GRC can correct the alleged deficiencies.

¹¹ The Custodian in the SOI addressed the Complainant's August 27, 2009 OPRA request but did not address the Complainant's July 31, 2009 request.

October 6, 2009

Letter from the GRC to the Custodian. The GRC informs the Custodian that the SOI is being returned to her because it has inaccurate or missing information in the Custodian’s responses to items number 7, 8, 9, 10 and 12. The GRC informs the Custodian that it only returns an incomplete SOI one time and that the Custodian must correct and resubmit the SOI to the GRC by October 13, 2009.

October 7, 2009

Telephone call from the Custodian to the GRC. The Custodian states that she needs clarification on how to correct the SOI. Preparation of the SOI is discussed and the Custodian agrees to make modifications to the SOI and return it to the GRC prior to October 13, 2009.

October 7, 2009

E-mail from the GRC to the Custodian. The GRC confirms the telephone conversation between the GRC and the Custodian earlier this date.

October 7, 2009

E-mail from the Custodian to the GRC. The Custodian sends a duplicate copy of the SOI that she submitted to the GRC on October 6, 2009.

October 7, 2009

E-mail from the Complainant to the GRC. The Complainant states that the Custodian has been cooperative with him. The Complainant states that the problem in obtaining the records he requested is not due to the Custodian’s actions. Rather, the Complainant states that the problem rests with some of the elected officials that the Complainant believes took actions outside the normal channels and/or procedures of municipal government.

October 7, 2009

E-mail from the Custodian to the GRC. The Custodian sends an updated copy of the document index and a one (1) page narrative to supplement her SOI. The document index the Custodian submitted provides as follows:

(A) List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).	(B) List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant’s OPRA request	(C) List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).	(D) If records were disclosed with redactions, give a general nature description of the redactions.	(E) If records were denied in their entirety, give a general nature description of the record.	(F) List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.
All minutes from any meeting including committees,	Permanent	Minutes of Board of Education management for July 29, 2009 via e-mail to Mr.	None	None	N/A

conversations pertaining to Stockton's location of a campus in Hammonton. (Two pages).		Ingemi. Provided on August 12, 2009.			
Any correspondence or request made between Hammonton, State, County or Stockton officials concerning grant application.	Grant applications six (6) years after term of grant.	None	None	None	None
Logs of any notes made from conversations (internal and external) pertaining to Stockton.	Three (3) years.	None	None	None	None

The Custodian certifies that she also provided in the document index a description of e-mails that she sent to the GRC showing that she tried to obtain the records requested.¹² The Custodian certifies that because a report was given at a Council meeting referring to approval of the Stockton/Hammonton grant application, the agency should have the application on file. The Custodian certifies that she conducted a search of the files with Clerk's Office staff Susanne Oddo and Frank Zuber and all three individuals concluded that the municipality is not in possession of the record. The Custodian also certifies that Mr. Zuber conducted a search of the online records but could not locate the grant application on the grants online program. The Custodian certifies, however, that a report from Councilwoman Petrongolo at the July 27, 2009 Council meeting and the minutes of the Hammonton Board of Education dated July 29, 2008 both referenced a Stockton/Hammonton project grant.

December 3, 2009

E-mail from the Custodian to the Complainant. The Custodian forwards an eight (8) page document to the Complainant titled "Offices of Senators Lautenberg and

¹² These e-mails are not included in the reprinted document index which appears in the Findings and Recommendations above because they are not pertinent index content.

Menendez Fiscal Year 2008 Appropriations Request Form Due by February 15, 2008.” The project title is “The Richard Stockton College of New Jersey EcoCenter and Satellite Campus.” The Custodian informs the Complainant that this document was “mysteriously dropped in the mail box for the town clerk” and states that she believes it is the record that the Complainant requested.

December 11, 2009¹³

E-mail from the Complainant to the GRC. The Complainant forwards to the GRC the document the Custodian attached to her e-mail to the Complainant dated December 3, 2009. The Complainant states that the document is not what he wanted.

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 form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access

¹³ 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.

... 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.

In this matter, the Complainant filed two (2) OPRA requests. The Complainant’s first request was filed on July 31, 2009 and the Custodian marked it received “in person” on that same date. The Complainant’s second request was marked as received on August 27, 2009. The Custodian responded to the former request in writing on August 12, 2009, which was the eighth (8th) business day after she received the request. The Custodian responded to the latter request in writing on September 1, 2009, which was the third (3rd) business day following receipt of that request. Although the Custodian responded in a timely manner to the Custodian’s August 27, 2009 request, she failed to respond in a timely manner to the Complainant’s July 31, 2009 request.

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.¹⁴ 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).

Here, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a

¹⁴ 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Request dated July 31, 2009 seeking copies of (1) all minutes from any meeting to include committees and conversations pertaining to Stockton’s location of a campus in Hammonton, (2) any correspondence and earmark request between Hammonton and Congressional delegations, State and County representatives and Stockton officials and (3) logs of and notes from conversations, internal and external, pertaining to Stockton.

The Custodian attempted to fulfill the Complainant’s request for the records sought in his request dated July 31, 2009. The Custodian, after conducting a search for what she thought were records responsive to the Complainant’s request, disclosed to the Complainant copies of Hammonton Board of Education meeting minutes dated July 29, 2008, copies of Hammonton Council meeting minutes dated July 27, 2009 and newspaper articles from *The Hammonton Gazette* dated August 5, 2009.

Although the Complainant stated in his complaint that he did not seek this material, it was not clear precisely which records he sought because his request asked for such items as “all minutes from any meeting,” “any correspondence,” “logs of and notes from...internal and external” conversations. The Complainant asked for records between Hammonton and such other entities as Congressional delegations, State representatives, County representatives and Stockton officials. The Complainant did state that he was requesting information pertaining to Stockton’s location of a campus in Hammonton, but he failed to describe with specificity the records he was requesting. Further, the Complainant did not provide the date for any record requested or even a timeframe during which a record would have been generated.

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),¹⁵ 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.”¹⁶

¹⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁶ 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..."

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)."

In this instant complaint, to properly fulfill the Complainant's request the Custodian would have to determine if and when the municipality considered locating a Stockton campus in Hammonton, then research almost every record in the municipality generated contemporaneously with such consideration. However, pursuant to MAG, supra, the Custodian is under no obligation to conduct research in response to an OPRA request.

Therefore, because the Complainant's July 31, 2009 request fails to identify with reasonable clarity the records sought and because fulfilling such a request would require research which the Custodian is not obligated to conduct, said request is invalid under OPRA pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and the Council's decision in Schuler, supra. As such, the Custodian has not unlawfully denied access to the records sought in the Complainant's July 31, 2009 OPRA request.

Request dated August 27, 2009 seeking the Economic Development Initiative application to HUD filed by the Downtown Advocate.

Although the Complainant's request would have been clearer had he provided the date of the application or a timeframe bracketed by dates, the request does seek a specifically named record which was filed by a specific person or office. Therefore, the record was sufficiently identified pursuant to MAG, supra, and its progeny such that the Custodian was obligated to respond.

The Custodian attempted to locate this record by sending several written inquiries to the Mayor and Council members; however, there is nothing in the evidence of record to indicate that any of the e-mail recipients replied to the Custodian's requests contained in any of her e-mails.¹⁷ The Custodian first certified in the SOI that Solicitor Howell informed her that the grant application responsive to the Complainant's request was prepared online and that a copy was not made or retained; however, the Custodian subsequently seemed to contradict this by certifying that Mr. Zuber conducted a search of the online records but could not locate the grant application on the grants online program. Although a copy may not have been made or retained, the grants online program would have indicated whether or not the grant application was prepared online.

¹⁷ Councilwoman Petrongolo replied to an e-mail inquiry from the Custodian, but it was an inquiry that pertained to the Complainant's July 31, 2009 request.

To further confuse this issue, the Custodian certified that a report was given at a Council meeting referring to approval of the Stockton/Hammonton grant application; therefore the Custodian certified that the agency should have the application on file. Then, over three (3) months after the Custodian sent her final inquiry to the Mayor requesting that the Mayor and/or Council members inform her where she could find a copy of the grant application, the Custodian stated that a copy of what she believed was the record that the Complainant requested was “mysteriously dropped in the mail box for the town clerk.” The Complainant, however, denied this was the record he wanted.

The Complainant stated that the reason the record responsive to his complaint could not be located was due to interference by some of the elected officials who the Complainant believes took actions outside the normal channels and/or procedures of municipal government. The Complainant neither named such elected officials nor did he explain what he meant by such officials taking action outside the normal channels of government.

As such, based on the inadequate evidence presented in this matter, the GRC is unable to determine whether a municipal official may have unlawfully denied access to the record responsive to the Complainant’s August 27, 2009 request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether a municipal official did unlawfully deny access to the record responsive to the Complainant’s August 27, 2009 request, and if so, for a further determination of whether such municipal official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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 requests 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s July 31, 2009 request fails to identify with reasonable clarity the records sought and because fulfilling such a request would require research which the Custodian is not obligated to conduct, said request is invalid 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), and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied access to the records sought in the Complainant’s July 31, 2009 OPRA request.

3. Based on the inadequate evidence presented in this matter, the GRC is unable to determine whether a municipal official may have unlawfully denied access to the record responsive to the Complainant's August 27, 2009 request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether a municipal official did unlawfully deny access to the record responsive to the Complainant's August 27, 2009 request, and if so, for a further determination of whether such municipal official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010