



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 29, 2010 Government Records Council Meeting

Christopher A. Gray, Esq.
Complainant

Complaint No. 2010-11

v.

County of Camden
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 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 requests for the records relevant to the complaint are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s requests pursuant to the Superior Court’s decisions in 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decisions in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant’s OPRA requests in writing within the statutorily mandated seven (7) business days which resulted in a “deemed” denial of



the Complainant's OPRA requests, and although the Custodian failed to complete and submit the Statement of Information to the GRC as requested, the Custodian did respond in writing to the Complainant's requests within eleven (11) business days denying the Complainant's requests. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 29th Day of June, 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: July 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Christopher A. Gray, Esq.¹
Complainant**

GRC Complaint No. 2010-11

v.

**County of Camden²
Custodian of Records**

Records Relevant to Complaint:

1. Photocopies of any and all documents and e-mails from May 1, 2008 to August 31, 2009 pertaining to the application and denial of Steve Bayruns for the position of Senior Registered Environmental Health Specialist for Public Health.
2. Photocopies of any and all documents and e-mails from May 1, 2008 to August 31, 2009 pertaining to the promotion of Loretta Blake to the Senior Registered Environmental Health Specialist for Public Health position, including any materials as to why other candidates were not promoted.
3. Photocopies of any and all documents and e-mails from May 1, 2008 to August 31, 2009 pertaining to the county's verification of residence for Loretta Blake.

Requests Made: August 31, 2009

Response Made: September 15, 2009

Custodian: Maria Efstratiades, Clerk

GRC Complaint Filed: January 13, 2010³

Background

August 31, 2009

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on three (3) official OPRA request forms.⁴

September 15, 2009

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's OPRA requests on the eleventh (11th) business day following receipt of such requests. The Custodian states that the Complainant's request for Item No. 1 of the records relevant to the complaint is unclear and asks the Complainant for

¹ No legal representation listed on record.

² No legal representation listed on record.

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

⁴ The Complainant submitted three (3) separate OPRA request forms all dated August 31, 2009. The three (3) request forms were submitted to the Custodian under one (1) cover letter referencing all three (3) requests. The cover letter was also dated August 31, 2009.

clarification. The Custodian further states that the Complainant's requests are denied because they are not requests for records.

January 13, 2010

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

- Complainant's OPRA requests dated August 31, 2009
- Custodian's response to the OPRA requests dated September 15, 2009

The Complainant states he provided his OPRA requests to the Custodian on August 31, 2009 and that said requests were denied by the Custodian on September 15, 2009 because the Custodian alleged the requests were not requests for documents.

The Complainant does not agree to mediate this complaint.

March 12, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.⁵

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

⁵ The Custodian never responded to the GRC's request for the Statement of Information.
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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.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...*(Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ 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 Complainant asserts that his OPRA requests were received by the Custodian on August 31, 2009 and that the Custodian responded to the requests on September 15, 2009, informing the Complainant that his requests were denied because they were not requests for records. Further, the evidence of record supports the Complainant’s assertions.

⁶ 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.

Accordingly, the Custodian's failure to respond to the Complainant's OPRA requests dated August 31, 2009 in writing 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, supra.

In the Complainant's requests for the records relevant to the complaint, the Complainant requested "any and all documents and e-mails" over a sixteen (16) month period pertaining to an "application and denial" of a position for Steve Bayruns and a promotion for Loretta Blake. With respect to Loretta Blake's promotion, the Complainant also requested "materials as to why other candidates were not promoted." Item No. 3 of the records relevant to the complaint requests "any and all documents and e-mails" over the same time period pertaining to the "county's verification of residence" of Loretta Blake.

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),⁷ 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."⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.'" The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, supra.

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 No. 2 through 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).” Elcavage v. West Milford Township (Passaic),

Moreover, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that in accord with MAG, *supra*, and its progeny, in order to *specifically identify* an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.

In the instant complaint, the Complainant identified neither the sender nor the recipient of the requested e-mails. As such, notwithstanding the otherwise all encompassing nature of the Complainant’s requests, the Complainant failed to specifically identify the e-mail records pursuant to the Council’s decision in Elcavage, *supra*. With respect to the documents requested, not only did the Complainant fail to specifically identify any government records but the Complainant’s all encompassing requests would require the Custodian to conduct an extensive amount of research in order to locate what may or may not be the desired records.

Accordingly, because the Complainant’s requests for the records relevant to the complaint are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s requests pursuant to the Superior Court’s decisions in MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and the Council’s decisions in Schuler, *supra*, and Elcavage, *supra*.

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

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

Here, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant’s OPRA requests in writing within the statutorily mandated seven (7) business days which resulted in a “deemed” denial of the Complainant’s requests, and although the Custodian failed to complete and submit the SOI to the GRC as requested, the Custodian did respond in writing to the Complainant’s requests within eleven (11) business days denying the Complainant’s requests. Further, there is no evidence in the record to suggest that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 requests for the records relevant to the complaint are overbroad and fail to specifically identify the records sought, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to conduct research to locate records potentially responsive to the Complainant’s requests pursuant to the Superior Court’s decisions in 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decisions in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010).

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to respond to the Complainant's OPRA requests in writing within the statutorily mandated seven (7) business days which resulted in a "deemed" denial of the Complainant's OPRA requests, and although the Custodian failed to complete and submit the Statement of Information to the GRC as requested, the Custodian did respond in writing to the Complainant's requests within eleven (11) business days denying the Complainant's requests. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010