



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Stuart J. Alterman, Esq.
(on behalf of Louis Mercurio)
Complainant

Complaint No. 2010-118

v.

Borough of Haledon (Passaic)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that no records exist which are responsive to request Items No. 1 through 8 of the Complainant’s request, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. Because the Complainant’s request Item No. 9 is overly broad and does not specifically identify a government record sought, the request item is invalid under OPRA 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), 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).



4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian legally certified that no records exist which are responsive to request Items No. 1 through No. 8 and request Item No. 9 is overly broad and unclear and is therefore invalid under OPRA, 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 26th Day of October, 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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stuart J. Alterman, Esq.¹
(on behalf of Louis Mercurio)
Complainant**

GRC Complaint No. 2010-118

v.

**Borough of Haledon (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Name and title of the appropriate authority for the Borough of Haledon, between May 1, 2009 and April 1, 2010.
2. All Rice notices that the Borough provided to Chief Louis Mercurio, concerning his employment as Chief of Police with the Borough of Haledon, between May 1, 2009 and April 1, 2010.
3. Any and all documents where the Borough of Haledon discusses filing disciplinary actions against Chief Louis Mercurio for any and all reasons between May 1, 2009 and April 1, 2010.
4. The nature, extent or substance of any discussions concerning the Borough of Haledon, its agents, servants, and/or employees or electing officials discussing disciplining Chief Louis Mercurio between May 1, 2009 and April 1, 2010.
5. A list of any and all complaints provided by any individuals to the Borough of Haledon, its agents, servants, and/or employees or elected officials about Chief Louis Mercurio, and his performance as Chief, between May 1, 2009 and April 1, 2010.
6. A list of dates, and by whom, of any and all discussions that took place with Chief Louis Mercurio by any agent, servant and/or employee or elected official regarding any of the administrative charges against Chief Louis Mercurio.
7. A list of dates and times when the Mayor of the Borough of Haledon brought to Chief Louis Mercurio's attention any of the administrative charges brought against him between May 1, 2009 and April 1, 2010, and provided him the opportunity to correct or remediate the complaints as found in said charges.
8. A list of people who have complained about having their expungements mishandled by Chief Louis Mercurio.
9. All violations with the law of any kind that Chief Louis Mercurio alleges against the following liquor-serving establishments:
 - a. The Belmont
 - b. Jimmy G's

¹ The evidence of record indicates that the Complainant is an attorney representing Louis Mercurio.

² Represented by Andrew P. Oddo, Esq. (Oradell, NJ).

c. Celebration Bar

Request Made: April 8, 2010³
Response Made: April 23, 2010
Custodian: Allen Susen
GRC Complaint Filed: June 7, 2010⁴

Background

April 8, 2010

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

April 23, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that access to Item No. 1 of the requested records is denied because no records responsive to the request exist. The Custodian further states that access to records responsive to Item No. 2 of the requested records is denied because such record is a personnel record and is exempt from disclosure under OPRA. The Custodian further states that access to records responsive to Item No. 3 is denied because any records that may exist are exempt from disclosure under OPRA as personnel records and/or are subject to the attorney client privilege. The Custodian also states that access to records responsive to Items No. 4 through 8 is denied because no records responsive to the request exist. The Custodian asks the Complainant to clarify request Item No. 9 to be more specific as to the types of violations sought.

June 7, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁵

- Complainant's OPRA request dated April 8, 2010
- Letter from the Custodian to the Complainant dated April 23, 2010

The Complainant does not agree to mediate this complaint.

June 8, 2010

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

June 14, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 8, 2010

³ The OPRA request is stamped as received on April 12, 2010.

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

⁵ The Complainant does not make any arguments in support of his Denial Access Complaint. Stuart J. Alterman, Esq. (on behalf of Louis Mercuro) v. Borough of Haledon (Passaic), 2010-118 – Findings and Recommendations of the Executive Director

- Letter from the Custodian to the Complainant dated April 23, 2010

The Custodian certifies that his search for the requested records included reviewing all Borough files, policies and ordinances and consulting the Municipal Attorney and Police Department to locate any records responsive. The Custodian also certifies that no records responsive to this request were destroyed.

The Custodian asserts that he complied with OPRA by responding to the request within seven (7) business days of receipt of the request. The Custodian certifies that either no records responsive to the request existed or any records that did exist were exempt from disclosure under N.J.S.A. 47:1A-1.1 as attorney client privileged material or pursuant to N.J.S.A. 47:1A-10 as personnel records. The Custodian asserts that when reviewing the Complainant's request it is important to keep in mind the definition of a government record under OPRA at N.J.S.A. 47:1A-1.1.

In addition, the Custodian contends that several of the request items contained in the Complainant's OPRA request seek information regarding conversations and the Custodian is not required to transcribe or memorialize a conversation that did not take place at a public meeting. Furthermore, the Custodian asserts that many of these requests would be seen as interrogatories in the context of litigation rather than a request for government records available through OPRA.

The Custodian also certifies as follows for the corresponding numbered request items:

1. No records responsive exist.
2. Any Rice notices that may exist would be exempt from disclosure under OPRA as a personnel record pursuant to N.J.S.A. 47:1A-10.
3. Any records responsive between legal counsel and Borough employees that may exist that discuss pending litigation and/or potential disciplinary charges are considered attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1 and are therefore exempt from disclosure under OPRA.
4. – 6. These request items seek discussions. A discussion is not a government record as defined by OPRA and the Custodian is under no obligation to create a record that does not otherwise exist.
7. No records responsive to the request exist. Moreover, this request seeks to have the Custodian generate a record of dates and times when the Mayor brought certain facts to Louis Mercurio's attention. The Custodian is under no obligation to generate a responsive record that does not otherwise exist.
8. No records responsive to the request exist. Moreover, this request seeks to have the Custodian generate a record listing people who filed complaints against Louis Mercurio. The Custodian is under no obligation to generate a responsive record.
9. This request is unclear. The Custodian certifies that he previously requested that the Complainant clarify this OPRA request item and further certifies that the Complainant did not respond to the Custodian's request for clarification. Furthermore, the Custodian certifies that no records exist

of any liquor license charges brought against any of these three (3) establishments.

September 1, 2010

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian to clarify his arguments for Items No. 2 and No. 3. The GRC asks whether there are no documents responsive to Items No. 2 and No. 3 or are they exempt because they are considered personnel records or subject to the attorney-client privilege?

September 10, 2010

Letter from the Custodian to the GRC. The Custodian legally certifies that there are no records responsive to Items No. 2 and No. 3 pursuant to the Complainant's OPRA request.

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

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

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

The Complainant submitted a request for nine (9) items on April 8, 2010. The evidence of record indicates that the Custodian received said request on April 12, 2010

and responded in writing thereto on April 23, 2010, the ninth (9th) business day after receipt of such OPRA request. The Custodian's response denied access to Item No. 1 and Items No. 4 through 8 of the requested records because no records responsive to the request items exist. The Custodian denied access to records responsive to Item No. 2 of the requested records because such record is a personnel record and is exempt from disclosure under OPRA. The Custodian further denied access to records responsive to Item No. 3 because any records that may exist are exempt from disclosure under OPRA as personnel records and/or are subject to the attorney client privilege. The Custodian asked the Complainant to clarify request Item No. 9 to be more specific.

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).

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

The Custodian responded to Complainant's request for Items No. 1 and No. 4 through No. 8 asserting that no records responsive to these items exist. The Custodian later certified to this in his SOI. In addition, the Custodian submitted an additional legal certification stating that no records exist which are responsive to request Items No. 2 and No. 3. The Complainant has submitted no evidence to refute the Custodian's certifications.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

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.

Therefore, because the Custodian certified that no records responsive to Items No. 1 through 8 of the Complainant's request exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Because the record establishes that no records responsive to request Items No. 1 through 8 of the Complainant's request exist, the Council declines to address whether such request items are also overly broad and unclear under OPRA and are therefore invalid.

Whether the Complainant's request for Item No. 9 is broad and unclear?

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 # 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).”

The Complainant’s request Item No. 9 sought “all violations with the law of any kind that Chief Louis Mercurio alleges against the following liquor-serving establishments: 1) The Belmont; 2) Jimmy G’s; 3) Celebration Bar.” The Custodian denied this request item stating that the request was unclear and asked the Complainant to clarify his request. The Custodian later certified in his SOI that the Complainant did not respond to his request for clarification. The Custodian also certified that after a search no records existed regarding any liquor charges brought against the establishments noted in the Complainant’s request. The Custodian did not search for any additional violations because the request was unclear as to what type of charges the Complainant sought.

The Complainant’s request for all violations of any kind that Chief Louis Mercurio alleged against three specific liquor establishments fails to specify a date range or type of violation sought. As such, the request is overly broad and is therefore invalid under OPRA. In addition, the Council notes that the Custodian attempted to obtain clarification of what was perceived to be an overly broad request; however, the Complainant failed to respond to the Custodian’s request for clarification.

Therefore because the Complainant’s request Item No. 9 is overly broad and does not specifically identify a government record sought, the request item is invalid under OPRA 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), 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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.

The Custodian responded to the Complainant’s OPRA request nine (9) business days after receipt of such request. Additionally, the Custodian later certified that no records responsive to Items No. 1 through No. 8 exist. Furthermore, the request for Item No. 9 does not specifically identify a government record sought.

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

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian legally certified that no records exist which are responsive to request Items No. 1 through No. 8 and request Item No. 9 is overly broad and unclear and is therefore invalid under OPRA, 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 request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that no records exist which are responsive to request Items No. 1 through 8 of the Complainant’s request, and because there is no credible evidence in the record to refute the Custodian’s certification, the

Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

3. Because the Complainant's request Item No. 9 is overly broad and does not specifically identify a government record sought, the request item is invalid under OPRA 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), 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., because the Custodian legally certified that no records exist which are responsive to request Items No. 1 through No. 8 and request Item No. 9 is overly broad and unclear and is therefore invalid under OPRA, 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010