



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 21, 2010 Government Records Council Meeting

Stephen Gorbe
Complainant

Complaint No. 2010-136

v.

Monroe Fire District #3 (Middlesex)
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 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. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated date upon which he would provide the requested records to the Complainant.
2. Because the Complainant’s request Items No. 1, 2 and 3 seek information regarding the use of a job description memorandum in Edcon Associates’ testing of candidates for District 3 Firemen positions, these request Items fail to specify identifiable government records sought. Therefore, request Items No. 1, 2 and 3 are invalid under OPRA. 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).
3. Because the Custodian certified that no job description memorandum or other record responsive to Item No. 4 could be located after an extensive search of the archive storage boxes 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 record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

4. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. because he failed to provide a date certain when the Complainant could expect to receive responsive records, the Complainant's request for Items Nos. 1, 2 and 3 are requests for information rather than requests for specific identifiable government records and are therefore invalid under OPRA. In addition, the Custodian certified in the Statement of Information that after an extensive search of the archive storage boxes, no job description memorandum or other responsive record could be located in response to request Item No. 4. 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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: January 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Stephen Gorbe¹
Complainant**

GRC Complaint No. 2010-136

v.

**Monroe Fire District #3 (Middlesex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of the following with regard to the testing of candidates for District 3 Firemen positions conducted by Edcon Associates on March 31, 2004.

1. Was a job description memorandum used?
2. Was this memorandum posted in the Township firehouses and the municipal complex?
3. Was this memorandum advertised in the local newspapers?
4. A copy of the memorandum and any other documents that are public records that were used for the interviews.

Request Made: April 13, 2010

Response Made: April 19, 2010

Custodian: Peter J. Gasiorowski

GRC Complaint Filed: June 29, 2010³

Background

April 13, 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 19, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian informs the Complainant that fulfilling said request requires the review of old records and the Custodian will be unable to respond to the OPRA request within the seven (7) business day period. The Custodian states that that he will provide the Complainant with the requested information regarding Edcon Associates from 2004 as soon as possible.

¹ No legal representation listed on record.

² Represented by Robert Schwartz, Esq. (Monroe Township, NJ).

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

May 18, 2010

Letter from the Custodian to the Complainant. In response to request Items No. 1 and 2, the Custodian states that he has no knowledge or proof that a job description memorandum was ever used or posted in any firehouse or in the municipal complex. In response to request Item No. 3, the Custodian states that he has no knowledge that a job description memorandum was ever advertised in the local newspaper. In response to request Item No. 4, the Custodian states that no job description memorandum could be located after a thorough search of the archive storage boxes. Lastly, the Custodian states that no records exist that were used for interviews.

June 29, 2010

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

- Complainant’s OPRA request dated April 13, 2010
- Letter from the Custodian to the Complainant dated May 18, 2010

The Complainant states that because Edcon Associates held interviews and tested potential firemen, it is only logical that they would do the following:

1. A presentation in front of all the fire commissioners
2. A copy of all questions to the commissioners
3. A copy of any video or audio recordings made
4. Take notes of each man interviewed for later use
5. Advertising should have taken place in the following ways and locations:
 - all municipal bulletin boards
 - all three fire district bulletin boards
 - all local newspapers
 - all retirement communities within the Township.

The Complainant asserts that the information requested is within the Open Public Records Act and states his belief that the Custodian has unlawfully denied the Complainant’s rights to the information.

The Complainant does not agree to mediate this complaint.

July 20, 2010

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

July 28, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 13, 2010
- Letter from the Custodian to the Complainant dated April 19, 2010
- Letter from the Custodian to the Complainant dated May 18, 2010

Regarding request Items No. 1 and 2, the Custodian certifies that he was unaware of any job description memorandum which was posted in the Township’s firehouses and

the municipal complex. In response to request Item No. 3, the Custodian certifies that he has no knowledge or proof that any job description memorandum was posted in a local newspaper. Finally, the Custodian certifies that after extensive research in the archive storage boxes, no records were found to exist in response to the Complainant's OPRA request for Item No. 4.⁴

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 evidence of record indicates that the Complainant filed an OPRA request on April 13, 2010 seeking a copy of a job description memorandum or any other record used for interviews conducted on March 31, 2004 for candidates for District 3 Firemen positions. The Complainant also requested information as to whether a job description memorandum was used, whether such memorandum was posted in the Township firehouses and the municipal complex and whether the memorandum was advertised in the local newspapers.

⁴ The Custodian did not certify as to when the records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established by New Jersey Department of State, Division of Archives and Records Management.

The evidence of record further indicates that the Custodian responded in writing to the Complainant's request on the fourth (4th) business day following receipt thereof stating that fulfillment of the request required the review of old records and that the Custodian would be unable to respond to the OPRA request within the seven (7) business day period. The Custodian further stated that he would provide the Complainant with the requested information regarding Edcon Associates from 2004 as soon as possible.

The Council will first address whether the Custodian's response to the Complainant's OPRA request was sufficient.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to the Complainant's OPRA request on the seventh (7th) business day following receipt of said request. In the response, the Custodian requested an extension of time to respond to the request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

As in Hardwick, although the Custodian's response to the Complainant's request herein was timely and in writing, the Custodian failed to provide an anticipated date upon which the Complainant could expect disclosure of the requested records.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i and Hardwick, *supra*, because the Custodian failed to provide an anticipated date upon which he would provide the requested records to the Complainant.

The Council will next determine whether the Complainant's request for Items No. 1, 2 and 3 is valid under OPRA.

The Complainant's request Items No. 1, 2 and 3 are requests for information rather than requests for specific identifiable government records; these request Items are therefore invalid under OPRA. 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),⁵ 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.”⁶

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...”

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 Items No. 1, 2 and 3 seek information regarding the use of a job description memorandum in Edcon Associates’ testing of candidates for District 3 Firemen positions; as such, these request Items fail to specify identifiable government records sought. Therefore, request Items No. 1, 2 and 3 are invalid under OPRA. 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).

Moreover, the evidence of record indicates that no record responsive to request Item No. 4 exists.

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, and the

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, *supra*.

Complainant failed to submit any evidence to refute the Custodian's certification. 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, and the Complainant provided no evidence to refute the Custodian's certification.

In the matter before the Council, the Custodian certified in the SOI that after extensive research in the archive storage boxes, no memorandum or other record responsive to the Complainant's OPRA request for Item No. 4 could be located. Although the Complainant has asserted that it is only logical that responsive records would exist, such assertion does not rise to the level of competent, credible evidence sufficient to overcome the Custodian's certification.

Therefore, because the Custodian certified that no job description memorandum or other record responsive to Item No. 4 could be located after an extensive search of the archive storage boxes 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 record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the Custodian's insufficient response to the Complainant's OPRA request 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.

In the instant complaint, the evidence of record indicates that the Custodian responded to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request stating that he would not be able to respond within the seven (7) business day requirement, but failed to provide a date certain upon which the Complainant could expect disclosure of the requested records. Furthermore, the Complainant's request for Items No. 1, 2 and 3 is invalid under OPRA because these Items seek information and fail to specify identifiable government records. Finally, the Custodian certified in the SOI that there were no records responsive to request Item No. 4.

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 response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i. because he failed to provide a date certain when the Complainant could expect to receive responsive records, the Complainant's request for Items Nos. 1, 2 and 3 are requests for information rather than requests for specific identifiable government records and are therefore invalid under OPRA. In addition, the Custodian certified in the SOI that after an extensive search of the archive storage boxes, no job description memorandum or other responsive record could be located in response to request Item No. 4. 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. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated date upon which he would provide the requested records to the Complainant.
2. Because the Complainant's request Items No. 1, 2 and 3 seek information regarding the use of a job description memorandum in Edcon Associates' testing of candidates for District 3 Firemen positions, these request Items fail to specify identifiable government records sought. Therefore, request Items No. 1, 2 and 3 are invalid under OPRA. 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).

3. Because the Custodian certified that no job description memorandum or other record responsive to Item No. 4 could be located after an extensive search of the archive storage boxes 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 record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

4. Although the Custodian's response to the Complainant's OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.i because he failed to provide a date certain when the Complainant could expect to receive responsive records, the Complainant's request for Items Nos. 1, 2 and 3 are requests for information rather than requests for specific identifiable government records and are therefore invalid under OPRA. In addition, the Custodian certified in the Statement of Information that after an extensive search of the archive storage boxes, no job description memorandum or other responsive record could be located in response to request Item No. 4. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2010