



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

March 27, 2012 Government Records Council Meeting

Owen Urbay
Complainant

Complaint No. 2011-01

v.

Township of West Orange (Essex)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 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. Ms. Behar’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 (Interim Order October 31, 2007).
2. Because the Complainant’s request seeks information rather than identifiable government records, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), and Ms. Behar has not unlawfully denied access to the Complainant’s request. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. Although Ms. Behar’s failure to respond in writing to the Complainant’s request resulted in a “deemed” denial 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 (Interim Order October 31, 2007), the Complainant’s request is invalid under OPRA because it seeks information rather than identifiable government records. Additionally, the evidence of record does not indicate that Ms. Behar’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Behar’s improper response does 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 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Owen Urbay¹
Complainant**

GRC Complaint No. 2011-01

v.

**Township of West Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. The name of the person that alerted the United States Environmental Protection Agency (“USEPA”)³ of possible contamination in the area of the Complainant’s residence.
2. The results of the EPA’s findings to include what tests were being conducted, etc.

Request Made: April 29, 2010

Response Made: April 29, 2010⁴

Custodian: Karen J. Carnivale

GRC Complaint Filed: January 3, 2011⁵

Background

April 29, 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 29, 2010

Custodian’s response to the OPRA request. On behalf of the Custodian, Ms. Jo Ann Behar (“Ms. Behar”), Deputy Clerk, responds verbally to the Complainant’s OPRA request on the same day as receipt of such request. Ms. Behar states that she does not have answers for the Complainant’s questions. Ms. Behar states that Mr. Leonard Lepore (“Mr. Lepore”), Municipal Engineer, may be able to assist the Complainant because Mr. Lepore has the most knowledge about Township of West Orange (“Township”) environmental matters.

¹ No legal representation listed on record.

² Represented by Kenneth W. Kayser, Esq. (West Orange, NJ).

³ The Complainant uses the term “EPA.” The GRC assumes that the Complainant is referring to the United States Environmental Protection Agency.

⁴ The evidence of record indicates that Ms. Behar’s response to the OPRA request was verbal.

⁵ The GRC received the Denial of Access Complaint on said date.

October 10, 2010

Letter from the Complainant to the GRC. The Complainant states that he submitted an OPRA request to the Township on April 29, 2010. The Complainant states that the Township claimed they were not aware of the USEPA's presence in the Township. The Complainant states that he further refused the Township's suggestion that the Complainant file his OPRA request with another department.

The Complainant states that the Custodian failed to respond to his OPRA request. The Complainant further states that to date he has had no contact with the Township. The Complainant notes that this is not the first time the Township has failed to respond to an OPRA request.

January 3, 2011

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

- Complainant's OPRA request dated April 29, 2010 with the Township's date stamp thereon dated April 29, 2010.
- Letter from the Complainant to the GRC dated October 10, 2010.

The Complainant states that he hand delivered an OPRA request to the Township on April 29, 2010. The Complainant states that to date he has not received a response.

The Complainant agrees to mediate this complaint.

January 26, 2011

Offer of Mediation sent to the Custodian.

January 31, 2011

The Custodian agrees to mediation.

January 31, 2011

Complaint referred to mediation.

April 28, 2011

Complaint referred back from mediation.

May 6, 2011

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

May 13, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 29, 2010 with the Township's date stamp thereon dated April 29, 2010.
- Mr. Lepore's legal certification.
- Ms. Behar's legal certification.

The Custodian certifies that her search for the requested records included conducting a thorough search of all of the Township's files that could possibly contain records relating to the USEPA. The Custodian certifies she searched through State files that include the New Jersey Department of Environmental Protection ("NJDEP") records, the Township Laserfiche system that includes all resolutions and ordinances, and e-mails. The Custodian certifies that she did not locate any relevant records.

Moreover, Mr. Lepore certifies that he conducted a complete search of the Department of Public Works to locate any records pertaining to the USEPA and any investigations and studies the USEPA performed in the area of the Complainant's residence. Mr. Lepore certifies that he has been employed by the Township as Municipal Engineer since 1990 and is familiar with the files in his department. Mr. Lepore certifies that he did not locate any records relevant to the Complainant's OPRA request.

The Custodian also certifies that no 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.

Ms. Behar certifies that the Complainant came to the Clerk's Office on April 29, 2010 asking questions about the USEPA's presence in front of his residence. Ms. Behar certifies that the Complainant submitted an OPRA request at that time. Ms. Behar certifies that the OPRA request did not appear to be a request for records, rather, the Complainant was asking for information that Ms. Behar did not possess. Ms. Behar certifies that although she could not recall the exact words used, she explained to the Complainant that she was not required to answer his questions. Ms. Behar certifies that she informed the Complainant that Mr. Lepore might be able to assist him as Mr. Lepore would be the person at the Township most knowledgeable about environmental matters. Ms. Behar certifies that because she determined the Complainant's OPRA request was invalid, she date stamped same and gave it back to the Complainant without logging the request.

The Custodian's Counsel submits a letter brief in support of the Township's position. Counsel states that upon receiving the Complainant's OPRA request, Ms. Behar⁶ immediately determined that the request was invalid because it sought information. Counsel states that Ms. Behar had no knowledge of the event that precipitated the Complainant's OPRA request but believed that any records regarding the USEPA would be obtainable from Mr. Lepore. Counsel states that Ms. Behar date stamped the Complainant's OPRA request, handed it back to him and directed him to Mr. Lepore.

Counsel states that this was the last time Ms. Behar dealt with the Complainant's OPRA request until the Custodian received the Denial of Access Complaint from the GRC on January 26, 2011. Counsel states that following receipt of said complaint, both

⁶ Counsel notes that neither the Custodian nor Ms. Madelyn Longo, OPRA Coordinator, were present at the time that the Complainant submitted his OPRA request. Counsel further notes that because Ms. Behar had previously been Acting Clerk, she was fully familiar with OPRA procedures.

the Custodian and Mr. Lepore searched their files and determined that no relevant records existed. *See* Custodian’s and Mr. Lepore’s legal certifications.

Counsel states that “OPRA defines ‘government record’ broadly to include all documents and similar materials, and all information and data, including electronically stored data, that have been made or received by government in its official business.” Burnett v. County of Gloucester, 415 N.J. Super. 506, 512 (App. Div. 2010), *citing* Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009). Counsel contends that unlike Burnett, the Complainant here sought information which required research:

“Pursuant to MAG Entertainment v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), the custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request ... However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as ‘to go or look through carefully in order to find something missing or lost.’ The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’ (Emphasis added.) *Id.*, *citing* Donato v. Twp. Of Union, GRC Complaint No. 2005-182 (Interim Order dated January 31, 2007).

Counsel contends that the Complainant asked questions regarding the USEPA conducting tests in front of his residence rather than seeking identifiable government records that Ms. Behar could reasonably search for and locate. Counsel states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Court held that:

“[r]esearch is not among the custodian’s responsibilities ... OPRA does not contemplate ‘[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity.’ ... We observed that ‘[f]ederal courts, considering the permissible scope of requests for government records under the Freedom of Information Act ... 5 *U.S.C.A.* § 522, have repeatedly held that the requested record must be reasonably identified as a record not as a general request for data, information and statistics ...” (Internal citations omitted.) *Id.*

Counsel further states that the Court in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) held that

“[E]ven if the requested documents did exist, the custodian was under no obligation to search for them beyond the township’s files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of ... official business,’ as well as any document ‘received in the course of ... official business.’ N.J.S.A. 47:1A-1.1.

...

Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be "made, maintained or kept on file" by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1." *Id.* at 39.

Counsel contends that in Bent, appellant was seeking responses to allegations of police misconduct. Counsel asserts that similar to Bent, the Complainant here is seeking the Custodian's knowledge of the USEPA's activities including the reason for the USEPA's presence in his residential area and the results of any tests. Counsel contends that although the Complainant's request herein may not have required as much research as the request in Bent, the Complainant's OPRA request would have at the very least required some communication with the USEPA. Counsel further contends that the Township is not aware of any requirement on the USEPA's part to notify the Township of its investigation, results, or complaints thereto.

Counsel notes that as a matter of procedure, he would have advised that Ms. Behar accept and log the OPRA request and respond in writing indicating to the Complainant why the request was invalid. Counsel contends that notwithstanding that the Township could have chosen a better procedure to respond to the Complainant, its actions certainly do not rise to the level of a knowing and willful violation of OPRA.

Analysis

Whether Ms. Behar properly responded to the Complainant's OPRA request?

OPRA 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 ..." 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 ... 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 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.⁷ 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 (Interim Order October 31, 2007).

In the instant complaint, Ms. Behar certified in the SOI that the Complainant submitted an OPRA request to her on April 29, 2010. Ms. Behar further certified that she verbally responded to the Complainant at that time stating that she was not required to answer questions. Ms. Behar certified that she directed the Complainant to Mr. Lepore regarding any environmental matters within the Township. Ms. Behar certified that she date stamped the Complainant's OPRA request but did not log same.

The date stamp on the Complainant's OPRA request serves as evidence that Ms. Behar received same but failed to provide a written response within the statutorily mandated time period as is required under OPRA.

Therefore, Ms. Behar'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, supra.

Whether the Complainant's April 29, 2010 request is invalid under OPRA?

The Complainant's request seeks "[t]he name of the person that alerted the [USEPA] of possible contamination in the area of the Complainant's residence" and "[t]he results of the USEPA's findings to include what tests were being conducted, etc." These request items seek information rather than specific identifiable government records; as such, these request items are 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.

⁷ 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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁸ 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.”⁹

Additionally, in New Jersey Builders Association v. New Jersey Council of 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 (March 2008), the Council held that “[b]ecause the Complainant’s OPRA requests [No.] 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 LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that:

“... because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid 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)...” *Id.* at pg. 6.

The GRC also decided a similar issue in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Specifically, the complainant submitted an OPRA request to the Borough on September 13, 2007 seeking answers to five (5) questions regarding a property named the Villa Maria. The GRC held that the Complainant’s request was invalid because it failed to identify a specific government record. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Therefore, because the Complainant’s request seeks information rather than identifiable government records, the request is invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, LaMantia, *supra*, and Watt, *supra*, and Ms. Behar has not unlawfully denied access to the Complainant’s request. *See also* Ohlson, *supra*.

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

Whether the Ms. Behar’s improper response 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 (Felder 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 Ms. Behar’s failure to respond in writing to the Complainant’s request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*, the Complainant’s request is invalid under OPRA because it seeks information rather than identifiable government records. Additionally, the evidence of record does not indicate that Ms. Behar’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Behar’s improper response does 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. Ms. Behar'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 (Interim Order October 31, 2007).
2. Because the Complainant's request seeks information rather than identifiable government records, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), and Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), and Ms. Behar has not unlawfully denied access to the Complainant's request. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. Although Ms. Behar's failure to respond in writing to the Complainant's request resulted in a "deemed" denial 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 (Interim Order October 31, 2007), the Complainant's request is invalid under OPRA because it seeks information rather than identifiable government records. Additionally, the evidence of record does not indicate that Ms. Behar's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Behar's improper response does 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: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012