



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Kevin Debockler
Complainant

Complaint No. 2011-29

v.

Township of East Windsor (Mercer)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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. Although the Custodian’s response was timely and in writing, she failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Complainant’s request Items No. 2 through No. 7 fail to identify specific government records sought, the Complainant’s request is overly broad and is invalid under OPRA 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record. However the Complainant’s request Items No. 2 through No. 7 are invalid under OPRA because they fail to specifically identify a government record. Moreover, the Custodian provided all the records responsive to the Complainant’s OPRA request Item No. 1 that are in the Township’s possession. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was 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 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Kevin Debockler¹
Complainant**

GRC Complaint No. 2011-29

v.

**Township of East Windsor (Mercer)²
Custodian of Records**

Records Relevant to Complaint: Related to the 2009 re-evaluation of the Complainant's property in the Township of East Windsor, New Jersey ("Township"):

1. Any and all reports and lists of homes compiled for Township 2009 re-evaluation;
2. Hard copy in legible printed format of computer assisted data of all "actual" data, raw or refined, of comparable home sales, home values descriptions and relevant sales information;
3. All mass appraisal data gathered, compiled, assembled and/or used to calculate the Complainant's property assessment value;
4. All data in the possession of Realty Appraisal Company ("Company"), 4912 Bergenline Avenue, West New York, New Jersey, concerning the derivation of an assessment value that is or can be used by the Township or any employee thereof, including the Municipal Tax Assessor, Richard Kline ("Mr. Kline");
5. Hard copy of each individual's home sales that were used, relevant to the "mass appraisal" that was intended for the Township 2009 revaluation;
6. Stored data, statistical analysis and total "neighborhood" assembled "sales comparison" analysis;
7. Any Township data in the Company's possession and/or that is privately held by them or held by others for the Company that may be deemed Township business.³

Request Made: December 12, 2010

Response Made: December 14, 2010

Custodian: Cindy A. Dye

GRC Complaint Filed: January 28, 2011⁴

¹ No legal representation listed on record.

² Represented by David Orron, Esq., of Huff, Moran, & Orron (Cranbury, NJ).

³ The Complainant states that Township business includes Township appraisal data, analysis, and records that were contracted by the Township, for the Township's use or which have the potential to be used and is thus public information.

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

Background

December 12, 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.

December 14, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the first (1st) business day following receipt of such request.⁵ The Custodian provides the Complainant with the following: 1) a list of all the sales data relied upon for the Township-wide re-evaluation ("Sales Listing Report"); 2) a copy of the Realty Appraisal Company Hybrid Restricted Summary Appraisal Report ("Hybrid Appraisal Report") for the Complainant's property; and 3) A copy of the property record card for the Complainant's property.

January 28, 2011

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

- Complainant's OPRA request dated December 12, 2010⁶
- Letter from the Custodian to the Complainant dated December 14, 2010.⁷

The Complainant states that he filed an OPRA request with the Custodian on December 12, 2010. The Complainant also states that the Custodian failed to provide him with any useable information concerning the basis of his property assessment calculations. The Complainant further states that he requested more than just a "list" of all properties that had been sold from January 1, 2008 through October 1, 2009. The Complainant additionally states that he is seeking access to the methods of reassessment used by the Company for specific neighborhood homes.⁸

The Complainant states that he telephoned Appraisal Contractor, Mark Duda, ("Mr. Duda") on December 7, 2010 and December 13, 2010 asking for the complete method of valuation that was used. The Complainant also states that Mr. Duda refused to provide the method of valuation. The Complainant further states that Mr. Duda informed the Complainant that he used statistical analysis programs to make adjustments according to variables such as home condition, depreciation, neighborhood location, age, inflation and improvements. The Complainant additionally states that Mr. Duda also informed him that if a home owner challenges a re-evaluation, then his company provides a Hybrid Appraisal Report to corroborate the appraisal data.⁹ The Complainant states that because

⁵ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on December 13, 2010. The Custodian also date stamped the Complainant's OPRA request December 13, 2010.

⁶ The Complainant also attaches additional materials not relevant to the adjudication of this matter.

⁷ The Complainant attaches the Hybrid Appraisal Report and the property record card for the Complainant's property.

⁸ The Complainant argues additional facts not relevant to the adjudication of this matter.

⁹ The Complainant attaches notes from these telephone conversations with Mr. Duda.

a Hybrid Appraisal Report exists, the actual data and calculations for every home that was revalued must also exist.

The Complainant does not agree to mediate this complaint.

February 17, 2011

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

February 23, 2011¹⁰

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 12, 2010
- Letter from the Custodian to the Complainant dated December 14, 2010 with attachments.¹¹

The Custodian certifies that her search for the requested records included forwarding the Complainant’s OPRA request to Mr. Kline’s office. The Custodian also asserts that Mr. Kline reviewed his files and consulted with the Company and then provided to the Complainant: 1) a Sales Listing Report; 2) a Hybrid Appraisal Report for the Complainant’s property; and 3) the property record card for the Complainant’s property to the Complainant.

The Custodian also certifies that the Sales Listing Report provided to the Complainant must be kept for two (2) years in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian also certifies that the Hybrid Appraisal Report must be kept for six (6) years after completion of the contract in accordance with Records Management Services. Lastly, the Custodian certifies that the property record card provided to the Complainant is kept as it is updated in accordance with Records Management Services.

The Custodian certifies that the Complainant hand delivered his OPRA request on December 13, 2010. The Custodian also certifies that she forwarded the Complainant’s OPRA request via facsimile to Custodian’s Counsel and Mr. Kline. The Custodian further certifies that when conferring with Mr. Kline regarding the Complainant’s OPRA request, Mr. Kline informed the Custodian that the Complainant, using a false name, had contacted Mr. Duda in an attempt to obtain various information.¹² The Custodian additionally certifies that Custodian’s Counsel telephoned the Complainant on December 13, 2010 in an attempt to clarify the Complainant’s OPRA request. The Custodian certifies that when Counsel identified himself, the Complainant hung up the telephone. The Custodian also certifies that Counsel telephoned the Complainant again on December 13, 2010 and after Counsel again identified himself, the Complainant hung up the telephone.

¹⁰ The Complainant submitted additional correspondence not relevant to the adjudication of this complaint.

¹¹ The Custodian attaches the following records, which she provided to the Complainant in response to the Complainant’s OPRA request: 1) the Sales Listing Report; 2) Hybrid Appraisal Report; and 3) the property record card for the Complainant’s property.

¹² The Custodian does not certify when the Complainant contacted Mr. Duda. The Custodian also does not certify when she conferred with Mr. Kline regarding the Complainant’s OPRA request.

The Custodian certifies that she responded to the Complainant's OPRA request on December 14, 2010 via letter. The Custodian also certifies that she provided all the records responsive to the Complainant's OPRA request that are in the Township's possession. The Custodian further certifies that the Township will not respond to any other allegations made by the Complainant because they are beyond the scope of OPRA and access to the requested records.

Analysis

Whether the Custodian 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.

In the instant complaint, the Complainant filed an OPRA request on December 12, 2010. The Custodian responded to the Complainant's OPRA request via letter on the following business day of receipt of such request. The Custodian provided the Complainant with copies of the following: 1) the Sales Listing Report; 2) Hybrid Appraisal Report; and 3) the property record card for the Complainant's property. The Custodian failed to address each of the Complainant's request items in her response.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant's Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant's request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, “[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

In the matter before the Council, the Custodian responded in writing on the first business day following receipt of the Complainant’s OPRA request. The Custodian provided the Complainant with copies of records responsive to request Item No. 1. However, the Custodian failed to address the remaining request items contained in the Complainant’s OPRA request.

Although the Custodian’s response was timely and in writing, she failed to address each request item sought in the Complainant’s OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Whether the Complainant’s OPRA request is valid under OPRA?

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.

OPRA also provides that:

“government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, ... and any limitations on the right of access accorded by [OPRA] ... shall be construed in favor of the public's right of access[.]” 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.

In the instant complaint, the Complainant ‘s OPRA request sought: 1) Any and all reports and lists of homes compiled for Township 2009 re-evaluation; 2) Hard copy in legible printed format of computer assisted data of all “actual” data, raw or refined, of comparable home sales, home values descriptions and relevant sales information; 3) All mass appraisal data gathered, compiled, assembled and/or used to calculate the Complainant’s property assessment value; 4) All data in the possession of the Company, 4912 Bergenline Avenue, West New York, New Jersey, concerning the derivation of an assessment value that is or can be used by the Township or any employee thereof, including Mr. Kline; 5) Hard copy of each individual’s home sales that were used, relevant to the “mass appraisal” that was intended for the Township 2009 revaluation; 6) Stored data, statistical analysis and total “neighborhood” assembled “sales comparison” analysis; and 7) Any Township data in the Company’s possession and/or that is privately held by them or held by others for the Company that may be deemed Township business. The Complainant’s request Items No. 2 through No. 7 are overly broad and fail to identify specific government records sought and 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.

In determining that MAG Entertainment’s request for “all documents or records” from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then

be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005),¹³ 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.”¹⁴

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. 2 through No. 7 fails to specifically identify a government record; instead, these request items seek data and information used for the Township’s re-evaluation project. The term “data” is a general term and fails to identify specific types of records sought.

Therefore, because the Complainant’s request Items No. 2 through No. 7 fail to identify specific government records sought, the Complainant’s request is overly broad and is invalid under OPRA 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).

¹³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁴ As stated in Bent, *supra*.

However, the Complainant's request for Item No. 1 does specifically identify a government record because he requested the reports and the list of homes used for the re-evaluation project. However, the Custodian certified in the SOI submitted to the GRC on February 23, 2011 that she provided all the records responsive to the Complainant's OPRA request that are in the Township's possession. Thus, the Custodian did not unlawfully deny the Complainant access to the records responsive to request Item No. 1. See Rosenberg v. Bergen County Sheriff's Office, GRC Complaint No. 2008-96 (April 2009); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

Whether the Custodian's insufficient 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 (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).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record. However the

Complainant's request Items No. 2 through No. 7 are invalid under OPRA because they fail to specifically identify a government record. Moreover, the Custodian provided all the records responsive to the Complainant's OPRA request Item No. 1 that are in the Township's possession. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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. Although the Custodian's response was timely and in writing, she failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record, thus, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Complainant's request Items No. 2 through No. 7 fail to identify specific government records sought, the Complainant's request is overly broad and is invalid under OPRA 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 of Affordable Housing, 390 N.J.Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she failed to address each request item sought in the Complainant's OPRA request and did not provide a lawful basis for the denial of access to each requested record. However the Complainant's request Items No. 2 through No. 7 are invalid under OPRA because they fail to specifically identify a government record. Moreover, the Custodian provided all the records responsive to the Complainant's OPRA request Item No. 1 that are in the Township's possession. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012