



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

June 25, 2013 Government Records Council Meeting

Sabbir Rangwala
Complainant

Complaint No. 2012-171

v.

Borough of Point Pleasant Beach (Ocean)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to request item nos. 1-7 because said requests seek information rather than specifically identifiable government records. *See* 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Further, the records responsive to request item nos. 5-7 do not exist. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Sabbir Rangwala¹
Complainant**

GRC Complaint No. 2012-171

v.

**Borough of Point Pleasant Beach (Ocean)²
Custodian of Records**

Records Relevant to Complaint:

1. Total number of parking tickets issued during the months of May-September 2011.
2. Total number of parking tickets issued by Officer Charles Svenson during the same time period.
3. Total number of parking tickets issued during the months of May-September 2011 which were specifically violations of Ordinance 10-3.5, "Improper Display – No Ticket."
4. Total number of tickets issued by Officer Charles Svenson during the same period which were specifically violations of Ordinance 10-3.5, "Improper Display – No Ticket."
5. The data used to determine that parking fines were up in 2011 relative to 2010, as discussed at the Borough Council Meeting on July 19, 2011 by Mayor Barella and Ms. Riehl.
6. The data Chief O'Hara used to determine that 1,000 more parking tickets were issued in June 2011 than June 2010, as indicated at the Borough Council Meeting on July 19, 2011.
7. The data Chief O'Hara used to determine that parking violations were up 28.5% over last year, as indicated at the Borough Council Meeting on September 13, 2011.

Request Made: April 2, 2012

Response Made: May 1, 2012

GRC Complaint Filed: June 12, 2013³

Background⁴

Request and Response:

On April 2, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. After not receiving any response within the statutorily

¹ No legal representation listed on record.

² Maryann Ellsworth, Custodian of Records. Represented by Sean Gertner, Esq., of Gertner Mandel & Peslak, LLC (Lakewood, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

mandated seven (7) business days, the Complainant resubmitted the request on April 17, 2013. On April 19, 2012, the twelfth (12th) business day following the Custodian's receipt of said request, the Borough Attorney's assistant sent a response to an incorrect e-mail address for the Complainant. On May 1, 2012, the 20th business day following receipt of said request, the Borough Attorney resent his April 19, 2012 response, via regular mail. The Attorney denies request item nos. 1-4 on the basis that the requests are vague, ambiguous, overly broad and unduly burdensome. Additionally, the Attorney denies access to request item nos. 5-7 on the basis that no records responsive exist.

Denial of Access Complaint:

On June 12, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he submitted his OPRA request on April 2, 2012. The Complainant states that he resubmitted his OPRA request on April 17, 2012 because he did not receive any response to his initial request. The Complainant states that the Custodian responded on April 18, 2012, indicating that the Borough Attorney would be in contact regarding this request. The Complainant states that the Borough Attorney responded on May 1, 2012, denying access to the requested records, although his response letter is dated April 19, 2012. The Complainant asserts that the Attorney did not provide answers to any of the request items and claims it is inconceivable that no records responsive exist.

Statement of Information:

On August 31, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on April 2, 2012. The Custodian certifies that because there was ongoing litigation regarding this matter, she forwarded the request to the Borough Attorney to be treated as discovery. The Custodian certifies that the Borough Attorney sent a response to the Complainant on April 19, 2012, via e-mail and regular mail.⁵ The Custodian certifies that the Borough does not have the ability or an obligation to create the records requested because the Borough does not maintain said records.

Additional Information:

On September 18, 2012, the Complainant submitted correspondence to the GRC asserting that the Borough Attorney's April 19, 2012 response email was sent to the wrong e-mail address.⁶ The Complainant contends that he did not receive any response until May 3, 2012, when he received the Borough Attorney's letter dated April 19, 2012, but postmarked May 1, 2012.

⁵ The Custodian attaches an e-mail dated April 19, 2012, from the Borough Attorney's Assistant to the Complainant.

⁶ The Complainant states that the e-mail was sent to "...@verison.net" instead of "...@verizon.net."

Analysis⁷

Timeliness

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). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁸ 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).

Here, the Custodian certified that she received the Complainant's OPRA request on April 2, 2012 and forwarded said request to the Borough Attorney. The Custodian certified that the Borough Attorney responded to the OPRA request on April 19, 2012. However, the Complainant states that the April 19, 2012 e-mail was sent to an incorrect e-mail address and he did not receive the Borough Attorney's response until May 3, 2012 (letter postmarked May 1, 2012). Regardless of which date the Borough Attorney responded, April 19, 2012 or May 1, 2012, both dates are beyond the statutorily required seven (7) business day response time which would have been April 12, 2012.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, 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, supra.

Unlawful Denial of Access

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 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*

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁸ 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.

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),⁹ 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."¹⁰

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..."

Furthermore, in the case of nonexistent records, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, *supra*.

Here, the Complainant's request item nos. 1-4 seek the number of parking tickets issued during a specific timeframe. The Custodian's Counsel denied access to said request items on the basis that they are overly broad. The Complainant's request item nos. 5-7 seek data used to support various statements. The Custodian certified that no records responsive exist.

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Id. at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16.

Here, the Complainant failed to identify a specific type of document, but rather sought information, namely, the number of parking tickets issued, and data used to support various statements. Additionally, the Custodian's Counsel denied access to request item nos. 5-7 on the basis that no records responsive exist. The Custodian also certified in her SOI that no records responsive exist. The Complainant failed to submit any evidence to refute the Custodian's certification, but rather claimed it is inconceivable that records do not exist.

Therefore, the Custodian lawfully denied access to request item nos. 1-7 because said requests seek information rather than specifically identifiable government records. See MAG, supra, Bent, supra, and NJ Builders, supra. Further, the records responsive to request item nos. 5-7 do not exist. See Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, 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 (Interim Order October 31, 2007).
2. The Custodian lawfully denied access to request item nos. 1-7 because said requests seek information rather than specifically identifiable government records. See 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 180 (App. Div. 2007). Further, the records

responsive to request item nos. 5-7 do not exist. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Dara L. Barry
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Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013