



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 24, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint No. 2013-277

v.

Burlington County Clerk's Office
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the June 17, 2014 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 his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to request item No. 3 because the Custodian certified that no responsive records exist and there is no competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request item Nos. 2, 4 and 5 sought non-specific records, information and verification of facts, same are invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Morgano v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-69 (April 2012). Further, the Complainant's addition of "screen shot" in the clarified request did not cure these deficiencies. Thus, the Custodian has not unlawfully denied access to the Complainant's initial and amended requests.



4. The Custodian's failure to respond in a timely manner resulted in a "deemed" denial of access. However, the Custodian provided the record responsive to item No. 1, did not unlawfully deny access to the records responsive to item No. 3, and the remainder of the Complainant's request seeking information and verification is invalid. Further, the clarified request seeking screen shots would have required the Custodian to perform research. 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, 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 24th Day of June, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**David J. Roundtree¹
Complainant**

GRC Complaint No. 2013-277

v.

**Burlington County Clerk's Office²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. "A complete list of all the names that [were] given to the printer to supply each sample ballot to be mail (sic) in the primary."
2. "Please verify the letter sent to the printer and the sample ballot format used."
3. ". . . correspondence between the Superintendent of Elections, the County Clerk that verifies what was being sent to the printer."
4. "The documentation from the printer to all parties of the county; in reference to sample ballot (need a verification that the list of names received)."
5. ". . . please verify each [c]andidate name and [s]ignature as list for the [s]ample ballot with [the County's] NJ Voters data bank (throughout the county)."

Custodian of Record: Timothy D. Tyler
Request Received by Custodian: June 7, 2013
Response Made by Custodian: June 19, 2013
GRC Complaint Received: September 20, 2013

Background³

Request and Response:

On June 7, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On June 19, 2013, the eighth (8th) business day after receipt of the request, the Custodian responded in writing providing in response to Item No. 1 a sample ballot data file on compact disc ("CD"). The Custodian also provided in response to item No. 4 a copy of the UPS shipping document and a copy of the file of the number of voter records, sorted by municipality and processed by the mailer. Further, the

¹ No legal representation listed on record.

² Represented by Evan H. C. Crook, Esq., of Capehart & Scatchard (Trenton, NJ).

³ 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.

Custodian stated that no records responsive to the remainder of the Complainant's OPRA request existed.

On July 2, 2013, the Complainant stated that the Custodian did not provide all responsive records. Specifically, the Custodian's response did not contain a copy of a screenshot of all candidates to include the County Clerk. The Complainant noted that the Custodian could contact the Superintendent of Elections to pull up candidate names in a database and provide screenshots to the Complainant. The Complainant further stated that he wanted the "certify (sic) letter from the [S]tate to the [C]ounty verification letter verifying the [S]tate candidate." The Complainant stated that the Custodian need only follow his suggested process to obtain screenshots from the County of Burlington's ("County") database. The Complainant also disputed that no communications between the County and printer existed. Finally, the Complainant clarified his request as follows:

1. "Sample Ballot copy from all district (sic), the names of the candidates as listed" (emphasis omitted).
2. "Now please verify it by providing [the Complainant] a screen shot of the HAVA NJ voter register data bank (Screen shot of the names as listed and screen shot of the Signature (sic) as listed in the sample ballot (this will assure me that the name was found, if not then show the screen shot that what it states)." (Emphasis omitted).
3. "Please provide a copy of the letter that went to the printer, and all communication between all parties dealing with the sample ballot." (Emphasis omitted).
4. "The certify (sic) letter of the [S]tate to [C]ounty verification of the candidates . . . proof by having the [Superintendent] of election (sic) as the names are stated prove a screen shot of those named candidate with the signature screen shot too . . ."
5. ". . . please provide a screen [s]hot of the signature, [c]opy of the voter showing the name as listed on the certify State candidates letter and profile address of the signed legal voter name in the NJ register, was not provided a screen shot of the names of the candidates as signed on the petition, providing that the names are verified as listed on the sample ballot by HAVA the profile name and signature in the NJ register to provide the screen shot showing that the name and signatures do exist . . ." (Emphasis omitted).

Denial of Access Complaint:

On September 20, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that he was not provided with all records responsive to his OPRA request after contacting the Custodian in several e-mails seeking information. The Complainant noted that he included in this complaint a sample of a screenshot provided by Atlantic City and a State certification of nominees letter as examples of the records sought.

Statement of Information:⁴

On December 6, 2013, the Custodian filed a Statement of Information ("SOI"). The

⁴ On October 16, 2013, this complaint was referred to mediation. On November 1, 2013, this complaint was referred back to the GRC for adjudication.

Custodian certified that he received the request on June 7, 2013 and responded on July 19, 2013. The Custodian affirmed that he provided the Complainant records responsive to item Nos. 1 and 4 on June 19, 2013. The Custodian also certified that there are no records responsive to item Nos. 2, 3 and 5.

Further, the Custodian contended that items Nos. 2-5 were invalid because they ask the Custodian to verify certain information. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian argued that in accordance with GRC case law, the Complainant's requests sought verification and not identifiable government records. The Custodian also contended that, regarding item No. 5, voter signature records are exempt from disclosure. N.J.S.A. 47:1-9(a); N.J.S.A. 19:31-18; Roundtree v. Dep't of State, Div. of Elections, GRC Complaint No. 2011-266 (Interim Order dated May 28, 2011).

The Custodian asserted that notwithstanding the fact that the Complainant's OPRA request failed to specify identifiable records, he made a good faith effort to attempt to respond to same. The Custodian contended that item No. 1 sought complete list of names given to the printer to supply sample ballots in the mail and item No. 4 sought documentation from the printer to all parties in the County. The Complainant asserted that neither of these request items identified any specific records, yet, the Custodian provided a CD of sample ballot data and a mailing receipt.

Analysis

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).⁵ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on June 7, 2013, and responded in writing on June 19, 2013, the eighth (8th) business day after receiving the Complainant's OPRA request. Thus, the evidence supports that the Custodian failed to respond in writing within the statutorily mandated seven (7) business days.⁶

⁵ 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.

⁶ The Complainant clarified his request on July 2, 2013. However, the clarification was a rehashing of his original request with the addition of seeking screen shots, which will be addressed below.

Therefore, the Custodian did not bear his burden of proof that he 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, GRC 2007-11.

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 GRC notes that it will not address item No. 1 of the Complainant's request because the Custodian provided the responsive sample ballot sent to the printer via CD free of charge.

Request Item No. 3

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence is present in the record to refute the custodian's certification, there was no unlawful denial of access to same.

Here, the Complainant sought correspondence between the Superintendent and Clerk's Office about the information sent to the printer. Notwithstanding the fact that the Complainant's request item failed to identify a time frame in conformity with a proper request for correspondence (*See* Armenti v. Robbinsville Bd. Of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011)), the Custodian initially responded stating that no records exist. Thereafter, the Custodian certified to this fact in the SOI.

Therefore, the Custodian did not unlawfully deny access to request item No. 3 because the Custodian certified that no responsive records exist and there is no competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer, GRC 2005-49.

Validity of Request

The New Jersey Appellate Division 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." MAG, 375 N.J. Super. at 546 (emphasis added). The Court reasoned that:

Most 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. at 549 (emphasis added).

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.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in Morgano v. NJ Civil Serv. Comm’n, GRC Complaint No. 2011-69 (April 2012), the complainant requested “. . . a certification clarifying . . .” facts about a certain issue. The custodian denied the complainant’s request as invalid and the Council agreed, reasoning that:

The Complainant’s request that the Custodian provide a certification . . . does not seek the Custodian’s disclosure of an existing identifiable government record but instead seeks that the Custodian perform the action of clarifying facts through the creation of a legal certification. The performance of such an action does not further the Legislative purpose of increasing public access to information contained in records. Moreover, the performance of such an action is not among the enumerated duties of a custodian set forth in OPRA. As such, the Complainant’s request is invalid . . .

Id. at 5.

Further, 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 Council 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] and [Bent] . . .” Id. at 6.

In the instant matter, the Complainant contended that the Custodian failed to provide responsive records to his OPRA request. In the SOI, the Custodian argued that a majority of the

⁷ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Complainant's request was invalid because it sought information and further sought verification of facts.

Notwithstanding item Nos. 1 and 3 of the Complainant's request, the remainder of the request clearly seeks information (names), verification of facts and non-specific records (documentation). The Complainant's clarified request, which rehashed most of the original request, failed to cure these deficiencies and instead added the term "screen shot" to three (3) of the items without identifying candidates. The Custodian would thus have to ascertain every candidate in the County from ballots and then enter the names into the NJ Voters Data Bank, which is clearly research the Custodian was not required to conduct.

Therefore, because the Complainant's request item Nos. 2, 4 and 5 sought non-specific records, information and verification of facts, same are invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; LaMantia, GRC 2008-140; Morgano, GRC 2011-69. Further, the Complainant's addition of "screen shot" in the clarified request did not cure these deficiencies. Thus, the Custodian has not unlawfully denied access to the Complainant's initial and amended requests.

Knowing & Willful

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 ". . . [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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's failure to respond in a timely manner resulted in a "deemed" denial of access. However, the Custodian provided the record responsive to item No. 1, did not unlawfully

deny access to the records responsive to item No. 3, and the remainder of the Complainant's request seeking information and verification is invalid. Further, the clarified request seeking screen shots would have required the Custodian to perform research. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to request item No. 3 because the Custodian certified that no responsive records exist and there is no competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request item Nos. 2, 4 and 5 sought non-specific records, information and verification of facts, same are invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Morgano v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-69 (April 2012). Further, the Complainant's addition of "screen shot" in the clarified request did not cure these deficiencies. Thus, the Custodian has not unlawfully denied access to the Complainant's initial and amended requests.
4. The Custodian's failure to respond in a timely manner resulted in a "deemed" denial of access. However, the Custodian provided the record responsive to item No. 1, did not unlawfully deny access to the records responsive to item No. 3, and the remainder of the Complainant's request seeking information and verification is invalid. Further, the clarified request seeking screen shots would have required the Custodian to perform research. 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, 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: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014