



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-90

v.

NJ Department of Education
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 Complainant’s request was invalid because it failed to seek an identifiable record or records and would have required the Custodian to research the OPRA requests identified by the Complainant. N.J.S.A. 47:1A-6; MAG Entm’t LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). The Custodian bore his burden of proving he lawfully denied access to the Complainant’s OPRA request.

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 30th Day of June, 2015

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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint 2014-90

v.

**New Jersey Department of Education²
Custodial Agency**

Records Relevant to Complaint:³ Electronic copies via email of the identity of the Custodian[s] who fulfilled the following requests.⁴ “I understand that I am requesting ‘information’ here.”

Custodian of Record: Dominic Rota

Request Received by Custodian: February 10, 2014⁵

Response Made by Custodian: February 24, 2014

GRC Complaint Received: February 26, 2014

Background⁶

Request and Response:

On February 10, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 24, 2014, eight (8) business days⁷ after the receipt of the request, the Custodian responded in writing, advising that the request was improper. The Custodian asserted that he was not required to create a record in response to the Complainant’s request. MAG Entm’t, LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Christopher Huber.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The Complainant included a list of 31 OPRA requests for which he provided its alphanumeric identifier.

⁵ The Custodian stated in the Statement of Information that the request was received on February 8, 2014, a Saturday. The Complainant, however, states in his Complaint that his request was provided to the Custodian on Monday, February 10, 2014. For purposes of timeliness analysis, the GRC will use Monday, February 10, 2014, as the date the Custodian received the request.

⁶ 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.

⁷ All state offices were closed on February 13, 2014, due to a snow emergency.

Denial of Access Complaint:

On February 26, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to disclose the name(s) of the individuals who filled some thirty-one (31) OPRA requests, which he listed by their alphanumeric identifiers. The Complainant acknowledged that a custodian is not normally required to create a record; however, he stated his belief that the above-referenced request was an exception to that general rule. The Complainant argued that the public, pursuant to N.J.S.A. 47:1A-10(a) and Executive Order No. 26 (Gov. McGreevey 2002)(“EO 26”), is entitled to know the name, title, position, salary, payroll, length of service, date and reason of separation, and the amount and type of any pension received. In addition, the Complaint asserted the public has a right to know the identity of a custodian because a custodian could be subject to a statutory fine.

Statement of Information:

On April 11, 2014, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on February 8, 2014 (a Saturday). The Custodian certified that he responded, in writing, on February 24, 2014 to deny the request as invalid because it sought information rather than identifiable records.

The Custodian argued that the purpose of OPRA is to ensure an informed citizenry through maximizing the public’s knowledge of public affairs. Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004). The Custodian also argued that agencies are only obligated to disclose identifiable government records. MAG, 375 N.J. Super. at 546. Further, the Custodian asserted that requests for information, which the agency is expected to collate and compile, are outside OPRA’s scope. Id. He continued stating that a proper OPRA request must identify with reasonable clarity the documents sought and that OPRA does not permit requests for information. Bent v. Stafford Police Dep’t., 381 N.J. Super. 30, 37 (App. Div. 2005). Finally, the Custodian averred that OPRA does not require a custodian to exercise judgment or conduct analysis to identify responsive records. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012).

The Custodian argued that the Complainant failed to identify a specific government record. He noted that the request sought information, specifically the OPRA Custodian responsible for handling each individually identified OPRA request. In addition, the Custodian certified that no single record or combination thereof existed that would identify the custodian for each of the OPRA requests. Further, the Custodian contended that in order to comply with the request, he would be required to look up each request separately, cross-reference the date of each response with the assigned custodian at the time, and then create a list of all of the custodians to provide to the Complainant.

The Custodian argued that he denied the request because it failed to identify a specific record for production and rather sought information. In addition, Counsel maintained that the Custodian would be required to conduct research, which is improper and beyond OPRA’s scope.

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

In the instant matter, the Custodian certified in the SOI that he received the Complainant's OPRA request on February 8, 2014, a Saturday. The Complainant, in his Denial of Access Complaint, stated that the request was made on Monday, February 10, 2014. Presumably the Custodian received the request on February 10, 2014; thus, the first (1st) business day to respond began on February 11, 2014. Notwithstanding this calculation of time, the Custodian acknowledged that he responded to the request on February 24, 2014, eight (8) business days later.

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 New Jersey Appellate Division has held that:

While 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*

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.

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 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. at 549 (emphasis added). *See also Bent*, 381 N.J. Super. at 37,⁹ N.J. Builders Ass’n v. N.J. 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).

As an additional note, the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained, or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” Id. at 539-540. The Court did note that plaintiffs failed to include additional identifiers such as a case name or docket number.

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant sought the number of Jamesburg residents that hold library cards. The Council found 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, 375 N.J. Super. at 549].” Id. at 6. *See also Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009).

Here, the Complainant requested that the Custodian identify the name(s) of the specific custodian or custodians at the Department of Education who processed each of the listed OPRA requests. The Complainant failed to identify specific government documents, and in fact, acknowledged “that [he was] requesting ‘information’ here.” Accordingly, the Custodian was under no obligation to research each request, cross-reference the date of its response with the assigned custodian, and create a list of custodians for the Complainant.

Therefore, the Complainant’s request was invalid because it failed to seek an identifiable record or records and would have required the Custodian to research the OPRA requests identified by the Complainant. N.J.S.A. 47:1A-6. *See also MAG*, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; N.J. Builders, 390 N.J. Super. 166; Schuler, GRC 2007-151; LaMantia, GRC 2008-140. The Custodian bore his burden of proving he lawfully denied access to the Complainant’s OPRA request.

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

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 Complainant's request was invalid because it failed to seek an identifiable record or records and would have required the Custodian to research the OPRA requests identified by the Complainant. N.J.S.A. 47:1A-6; MAG Entm't LLC. V. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). The Custodian bore his burden of proving he lawfully denied access to the Complainant's OPRA request.

Prepared By: Ernest Bongiovanni
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

March 24, 2015¹⁰

¹⁰ This complaint was prepared for adjudication at the Council's March 31, 2015, April 28, 2015 and May 26, 2015 meetings, but could not be adjudicated due to lack of quorum.