



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

February 23, 2016 Government Records Council Meeting

Bruce Shapiro
Complainant

Complaint No. 2015-79

v.

City of Newark (Essex)
Custodian of Record

At the February 23, 2016 public meeting, the Government Records Council (“Council”) considered the February 16, 2016 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. While there is proof that two different City employees handled the Fed Ex packages containing the original and duplicate OPRA requests, received respectively on February 11, 2015, and February 26, 2015, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i), as there is no evidence identifying a City of Newark employee who might have misdirected them. Kovacs v. Union Cnty. Dep’t of Corr., GRC Complaint No. 2014-353 (September 2015). *See also* Reed v. Camden Cnty. Police Dep’t, GRC Complaint No. 2014-157 (February 2015).
2. The Custodian did not unlawfully deny access to the Complainant’s request for “all documents” concerning a range of topics. The request is invalid, as it is overly broad and fails to identify specific, government records. N.J.S.A. 47:1A-6. *See* MAG, 375 N.J. Super. at 546. Further, the Custodian would have to undertake research to comply with the request. “[R]equests that require the Custodian to conduct research have been deemed as invalid requests under OPRA.” DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-82 (September 2009). *See also* Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009).
3. Although an unidentified City employee failed to forward the original and duplicate requests, received on February 11, 2015, and February 26, 2015, the Custodian responded to the OPRA request upon receiving it March 17, 2015. Further the request was invalid. Additionally, the evidence of record does not indicate that the violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the various staff members do not



rise to the level of a knowing and willful violation of OPRA and an 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 23rd Day of February, 2016

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: February 25, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting**

**Bruce Shapiro¹
Complainant**

GRC Complaint No. 2015-79

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

1. Documentation or correspondence “pertaining to the Newark City Council’s January 12th vote initiating a study of whether a West Ward neighborhood development qualifies as an ‘area in need of redevelopment.’”
2. Documentation or correspondence “pertaining to plans being considered” by Newark City to use eminent domain to seize “underwater mortgages,” including references to where eminent domain is permitted under federal and/or State law.
3. Correspondence or documentation regarding federal prohibition to eminent domain and whether such occurrences have been considered by Newark officials “as to how implementing this form of eminent domain could affect any person interested in obtaining a federally backed mortgage in Newark in the future.”
4. Documentation or correspondence between “Newark officials and any State of New Jersey or federal officials regarding this type of eminent domain use.”

Custodian of Record: Kenneth Louis

Request Received by Custodian: March 17, 2015

Response Made by Custodian: March 17, 2015

GRC Complaint Received: March 24, 2015

Background³

Request and Response:

On March 17, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing to deny the request, stating that the request was for information rather than

¹ No legal representation listed on record.

² Represented by Vivian Sanks King, Esq. (Newark 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.

for specific records. The Custodian further stated that the request would require the Custodian to conduct research in order to determine which records might correlate to the records sought.

Denial of Access Complaint:

On March 24, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant attached to his Complaint what appeared to be a news article concerning “toxic mortgages” and a Federal Housing Finance Agency “Statement on Eminent Domain.” He also attached two Federal Express (“Fed Ex”) receipts showing, he contended, that he first made his request on February 11, 2015, and again on February 26, 2015, but received no response at those times.⁴

Statement of Information:

On April 2, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian argued that his denial of access was lawful, contending that OPRA does not require custodians to “conduct research among its records . . . and correlate data from various government records in the custodian’s possession.” *Citing Reda v. Twp. of W. Milford*, GRC Complaint No. 2002-58 (January 2003).

Additional information:

On January 14, 2016, the GRC asked the Custodian to explain why he first replied to the OPRA request on March 17, 2015, when the Complainant had proof showing that he sent his request by Fed Ex twice prior to that day, once on February 11, 2015, and again on February 26, 2015. In response, the Custodian certified that an employee of the Clerk’s Office, Shantesia Crawford, who works for the Records Management Unit but not the OPRA Unit, was on duty on February 26, and that the Fed Ex package in question was signed for by “S. Crawford.” He also certified that the Fed Ex package that was received February 11 may have been signed for by “Josephine,” another employee, but that neither employee recalled receiving either package.

Analysis

Failure to Forward/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

⁴ The Custodian certified that he did not receive the request until March 17, 2015, and replied the same day. The Complainant contended that he delivered a scanned copy of his original request via e-mail to the Custodian on March 17, 2015. The Fed Ex receipts he attached to his Complaint show that the February 11 package was sent to City Hall, Room 306, and the February 26 package was sent to City Hall, Room 415-A. Of note, Room 415-A is the room designated on the agency’s official OPRA request form.

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 dated October 31, 2007).

OPRA further provides that "[a]ny officer or *employee of a public agency who receives a request for access to a government record shall forward the request to the custodian . . . or direct the requestor to the custodian . . .*" N.J.S.A. 47:1A-5(h) (emphasis added).

In Werner v. NJ Dep't of Treasury, Div. of Revenue, GRC Complaint No. 2009-95 (April 2010), the complainant submitted an OPRA request on an official OPRA request form. An employee at the Division of Revenue received the request and responded without first forwarding it to the custodian. The employee subsequently certified that she processed the request as regular work. The Council held that the employee violated OPRA because "[a]lthough Ms. Harrington's duties do not include responding to [OPRA requests] . . . she still has an obligation . . ." to comply with N.J.S.A. 47:1A-5(h). Id. at 9. The Council further noted that "[b]ecause the Complainant's request was on the official OPRA request form . . . Ms. Harrington was alerted to the fact that this was a request for records pursuant to OPRA." Id.

In Lombardino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2013-93 (October 2013), the Clerk of the Municipal Court certified that she believed the complainant's request to be one for Discovery and processed it that way, clearly in disregard of the OPRA form. Because she failed either to forward the request to the Custodian or direct the requestor to the records custodian, the GRC found that the Clerk had violated N.J.S.A. 47:1A-5(h).

In the instant matter, two employees signed for the Fed Ex packages, which ostensibly contained the Complaint's first two attempts to make an OPRA request. One of the requests was directed to room 306, which the Fed Ex employee described as a "waiting area." The other was addressed to room 415-A, the room identified on the OPRA request form. No evidence, however, was presented to evidence that the employee(s) who received the package would have known that it contained an OPRA request. Although it is known who signed for the packages, it is unknown what those employees might have subsequently done with them. Thus, the Custodian only surmised that the "original requests were either not received by the OPRA unit or were received by others and misdirected."

Therefore, while there is proof that two different city employees handled the Fed Ex packages containing the original and duplicate OPRA requests, received respectively on February 11, 2015, and February 26, 2015, the GRC is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i), as there is no evidence identifying a City of Newark employee who might have misdirected them. Kovacs, GRC 2014-353. *See also* Reed v. Camden Cnty. Police Dep't, GRC Complaint No. 2014-157 (February 2015).

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.

Validity of Request

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 records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (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. at 549 (emphasis added). See Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ New Jersey Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009). See also DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-82 (September 2009).

In the present matter, while the request referenced subject matters and listed examples of documents that might be responsive, it failed to provide specific identifiers, such as, for example, a time frame or parties to the documents. Moreover, the request would require the Custodian to conduct research to determine which documents pertain to, or contain information pertaining to, overbroad, vague, and speculative subject matter, such as “federal prohibition on this type of eminent domain,” and “whether these occurrences have been taken into consideration by any officials in Newark.” Even more broadly, the request sought “any documentation or

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

correspondence between Newark officials and . . . New Jersey or federal officials . . . regarding this type of eminent domain.” As stated in Gillispie v. Dep’t of Labor and Workforce Dev., GRC Complaint No.2013-84 (October 2013), a custodian cannot be reasonably expected to locate and produce records based on such generic and broad identifiers. See Reed v. Camden Cnty. Police Dep’t, GRC Complaint No. 2014-158 (January 2015).

Similar to the facts in MAG, where the court held that a valid OPRA request must seek “identifiable government records” and that “a party cannot satisfy this requirement by requesting all of an agency’s documents,” the request at issue is impermissibly open-ended. 375 N.J. Super. at 549. The Custodian certified that the request was too broad and unclear, therefore requiring research to determine which records might correlate to the request. A custodian cannot be reasonably expected to locate and produce records based on such generic and broad identifiers.

Accordingly, the Custodian did not unlawfully deny access to the Complainant’s request for “all documents” concerning a range of topics. The request is invalid, as it is overly broad and fails to identify specific, government records. N.J.S.A. 47:1A-6. See MAG, 375 N.J. Super. at 546. Further, the Custodian would have to undertake research to comply with the request. “[R]equests that require the Custodian to conduct research have been deemed as invalid requests under OPRA.” DeAppolonio, GRC 2008-82. See also Bent, 381 N.J. Super. 30, 37; New Jersey Builders, 390 N.J. Super. 166, 180; Schuler, GRC 2007-151.

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 . . . penalties” 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 (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)).

Here, although an unidentified City employee failed to forward the original and duplicate requests, received respectively on February 11, 2015, and February 26, 2015, the Custodian responded to the OPRA request upon receiving it March 17, 2015. Further the request was invalid. Additionally, the evidence of record does not indicate that the violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the various staff members do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While there is proof that two different City employees handled the Fed Ex packages containing the original and duplicate OPRA requests, received respectively on February 11, 2015, and February 26, 2015, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i), as there is no evidence identifying a City of Newark employee who might have misdirected them. Kovacs v. Union Cnty. Dep't of Corr., GRC Complaint No. 2014-353 (September 2015). *See also* Reed v. Camden Cnty. Police Dep't, GRC Complaint No. 2014-157 (February 2015).
2. The Custodian did not unlawfully deny access to the Complainant's request for "all documents" concerning a range of topics. The request is invalid, as it is overly broad and fails to identify specific, government records. N.J.S.A. 47:1A-6. *See* MAG, 375 N.J. Super. at 546. Further, the Custodian would have to undertake research to comply with the request. "[R]equests that require the Custodian to conduct research have been deemed as invalid requests under OPRA." DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-82 (September 2009). *See also* Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009).
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Prepared By: Ernest Bongiovanni
Staff Attorney

February 16, 2016