



State of New Jersey
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 25, 2017 Government Records Council Meeting

Paul S. Kaplan
Complainant

Complaint No. 2016-150

v.

Township of Voorhees (Camden)
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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’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 requested item number 1, the municipal Emergency Management Plan. N.J.S.A. 47:1A-6. See Vasquez v. Burlington Cnty., GRC Complaint No. 2005-193 (February 17, 2005). See also Russomanno v. Twp. of Edison (Middlesex), GRC Complaint No. 2012-307 (November 2013), citing N.J.S.A. 47:1A-1.1.
3. The Complainant’s request for item number 2 is invalid because it fails to seek identifiable government records. 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). Thus, the Custodian did not unlawfully deny access to the Complainant’s request for this item. N.J.S.A. 47:1A-6.
4. Although the Custodian failed to respond in writing to the Complainant’s request within the statutorily mandated seven day period, which resulted in a “deemed” denial of the request, she did respond on the eighth day following receipt of said request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and



deliberate. Therefore, the Custodian's actions did 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 25th Day of April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Paul S. Kaplan¹
Complainant**

GRC Complaint No. 2016-150

v.

**Township of Voorhees (Camden)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Township of Voorhees' O.E.M. Plan.
2. "[A]ny additional doc[uments] pertaining to a CCRC (Con[tinued] Care Retire[ment] Comm[unity] relating to O.E.M."

Custodian of Record: Dee Ober

Request Received by Custodian: May 12, 2016

Response Made by Custodian: May 24, 2016

GRC Complaint Received: May 26, 2016

Background³

Request and Response:

On May 12, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 24, 2016, the eighth (8th) business day following receipt of said request, the Custodian's Counsel responded in writing, informing the Complainant that his request for item number 1 is denied pursuant to Executive Order 21 (McGreevey), which exempts records that, if disclosed, would increase the risk or consequences of potential acts of sabotage or terrorism. Counsel denied requested item number 2 as an overly broad request.

Denial of Access Complaint:

On May 26, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he mailed the OPRA

¹ No legal representation listed on record.

² Represented by Howard Long, Esq., of Wade, Long, Wood & Long, LLC (Laurel Springs, 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.

request to the Custodian on May 2, 2016.⁴ The Complainant further asserts that he did not receive a response to the request from the Custodian. The Complainant states that on May 24, 2016, he called the Clerk's Office and the Voorhees Police Department and "received the run-around."

Statement of Information:

On June 15, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 12, 2016, and responded in writing on May 24, 2016. The Custodian attached a copy of the response to the request as her legal argument justifying denial of the records.

The Custodian's Counsel states that the Complainant's request for item number 1, the municipality's Emergency Management Plan ("EMP"), was denied pursuant to Executive Order 21 (McGreevey), applicable to OPRA by operation of N.J.S.A. 47:1A-9. Counsel states that the Executive Order provides as follows:

1. At all levels of government - State, county, municipal and school district -- the following records shall not be deemed to be public records under the provisions of Chapter 404, P.L. 2001, and Chapter 73, P.L. 1963, and thus shall not be subject to public inspection, copying or examination:
 - a. Any government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

The Custodian's Counsel states that Executive Order 21 was determined by the Council to be a legal basis for denial of an EMP in Vasquez v. Burlington County, GRC Complaint No. 2005-193 (February 2006).

With respect to requested item number 2, Counsel argues that the request is overly broad and that the Custodian is not required to conduct research to fulfill the Complainant's request. Counsel cites MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), and Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005) as legal authority for denying the request.

Additional Submissions:

On June 9, 2016, the Complainant replied to the Custodian's SOI. The Complainant asserts that the requested records should not have been denied, but rather the Custodian should

⁴ The Complainant did not attach a copy of the request to the complaint. The Complainant stated that he did not make a copy of the request because it was a simple request. Accordingly, the requests listed here are as set forth by the Custodian's Counsel in the SOI.

have redacted any segments that were lawfully exempt from access. The Complainant states that he is seeking evidence to prove that the Custodian perjured herself.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).

The Custodian certified that she received the Complainant's OPRA request on May 12, 2016. The Custodian further certified that she responded in writing, through Counsel, denying the request on May 24, 2016, which was the eighth (8th) business day following receipt of the request.

Therefore, 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.

Request Item Number 1

The first item the Complainant requested is the municipality's Office of Emergency Management's EMP. The New Jersey State Police defines an EMP as "a formal document that describes the organization, responsibilities, *capabilities* and *procedures* of its municipality in responding to an emergency ... [and] outlines anticipated or possible emergency occurrences and

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.

details the methods, resources and procedures for coping with those situations.”⁶ (Emphasis added.)

In Vasquez v. Burlington Cnty., GRC Complaint No. 2005-193 (February 17, 2005), the GRC denied the complainant’s request for the county’s EMP based on Executive Order 21 (McGreevey). There, the custodian certified that disclosure of the county’s EMP would jeopardize the security of citizens of the state.⁷ The custodian further certified that the release of the county’s emergency evacuation procedures would expose citizens to acts of sabotage or terrorism.

More recently, in Russomanno v. Twp. of Edison (Middlesex), GRC Complaint No. 2012-307 (November 2013), the Council upheld the Custodian’s denial of the Township’s EMP from 2010 through 2012 “because such records contain security measures and emergency or security information or procedures that, if disclosed, would substantially interfere with the State’s ability to protect and defend the State and its citizens.” *Id.* In reaching its decision, the Council relied upon the Council’s holding in Vasquez, GRC 2005-193, as well as N.J.S.A. 47:1A-1.1, which provides in relevant part for the exemption of “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” and “security measures . . . which, if disclosed, would create a risk to the safety of persons, property, electronic data or software[.]”

In neither Vasquez nor Russomanno did the Council allow for disclosure of the EMP in redacted form. In both matters, the EMP was withheld from disclosure in its entirety because the Council determined that, if disclosed, it would jeopardize the security of the citizenry. Here, the Custodian denied the requested record in reliance upon the Council’s decision in Vasquez, GRC 2005-193, which held that disclosure of an EMP would jeopardize the security of citizens of the state, and expose citizens to acts of sabotage or terrorism.

Therefore, the Custodian did not unlawfully deny access to requested item number 1, the municipal EMP. N.J.S.A. 47:1A-6. See Vasquez, GRC 2005-193. See also Russomanno, GRC 2012-307, citing N.J.S.A. 47:1A-1.1.

Request Item Number 2

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.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor*

⁶ See http://ready.nj.gov/programs/basic_workshop.html

⁷ Executive Orders are applicable to OPRA by operation of N.J.S.A. 47:1A-9.

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), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant sought “any additional doc[uments] pertaining to a CCRC (Con[tinued] Care Retire[ment] Comm[unity] relating to O.E.M.” This request seeks potentially existing records, not specifically identified records. The request would require the Custodian to conduct research to locate any records *pertaining* to a CCRC, and then, should such records be found, to determine if they are *related* to the Office of Emergency Management. “OPRA . . . is not intended as a research tool litigants may use to force government officials to identify and siphon useful information.” MAG, 375 N.J. Super. at 546.

Therefore, the Complainant’s requested for item number 2 is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant’s request for this item. N.J.S.A. 47:1A-6.

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 (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 the Custodian failed to respond in writing to the Complainant’s request within the statutorily mandated seven day period, which resulted in a “deemed” denial of the request, she did respond on the eighth day following receipt of said request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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’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 requested item number 1, the municipal Emergency Management Plan. N.J.S.A. 47:1A-6. *See* Vasquez v. Burlington Cnty., GRC Complaint No. 2005-193 (February 17, 2005). *See also* Russomanno v. Twp. of Edison (Middlesex), GRC Complaint No. 2012-307 (November 2013), citing N.J.S.A. 47:1A-1.1.
3. The Complainant’s request for item number 2 is invalid because it fails to seek identifiable government records. 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). Thus, the Custodian did not unlawfully deny access to the Complainant’s request for this item. N.J.S.A. 47:1A-6.

4. Although the Custodian failed to respond in writing to the Complainant's request within the statutorily mandated seven day period, which resulted in a "deemed" denial of the request, she did respond on the eighth day following receipt of said request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

April 18, 2017