State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 26, 2016 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2015-147

At the July 26, 2016 public meeting, the Government Records Council ("Council") considered the June 21, 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. Taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant's OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "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's initial failure to locate a record constitutes an insufficient search. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).

3. The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, *et al.*, Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2015-147**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies of all Open Public Records Act ("OPRA") requests filed (excluding those filed by the Complainant) from June 12, 2013, through December 31, 2013.

Custodian of Record: Donald E. Kazar
Request Received by Custodian: January 15, 2014
Response Made by Custodian: January 27, 2014
GRC Complaint Received: May 27, 2015

Background[3]

Request and Response:

On January 15, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 27, 2014, the seventh (7th) business day after receipt of the OPRA request,[4] the Custodian responded in writing, disclosing multiple records.

Denial of Access Complaint:

On May 27, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond to the subject OPRA request in a timely manner. Specifically, the Complainant contended that the Custodian failed to respond by January 24, 2014, which the Complainant calculated to be the seventh (7th) business day. The Complainant contended that the Custodian, who is well versed in the statutory response time based on numerous prior GRC decisions against him, knowingly and willfully failed to respond timely to the subject OPRA request.

[1] Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).
[2] Represented by Francesco Taddeo, Esq. (Somerville, 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.
[4] All public agencies were closed on January 20, 2014, for a federal holiday.

Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-204 *et seq.* (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-233 (Interim Order dated October 26, 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160 *et seq*. (Final Decision dated September 25, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-161 *et seq*. (Interim Order dated August 28, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013).

In addition, the Complainant contended that the Custodian knowingly and willfully withheld one (1) OPRA request submitted by John Paff, which was responsive to the subject OPRA request. The Complainant asserted that, at the time of the Custodian's response, he possessed no evidence that the Custodian failed to provide the record.[5] The Complainant stated that he subsequently submitted an OPRA request to the Custodian on April 25, 2015, seeking all e-mails between the Custodian and Mr. Paff regarding OPRA from the time period January 1, 2013 and the date of the request. The Complainant averred that the Custodian provided, among other records, a copy of the withheld OPRA request.

The Complainant contended that this disclosure proves that the Custodian never intended to disclose Mr. Paff's request to the Complainant in response to the subject OPRA request. The Complainant contended that Mr. Paff's OPRA request was integral to arguments presented in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-57, *et seq.* (Interim Order dated May 24, 2016). The Complainant surmised that the Custodian deliberately and intentionally withheld Mr. Paff's request with no intention of ever disclosing it to the Complainant. Further, the Complainant asserted that the Custodian apparently intended to hide the record "*forever*" (emphasis in original). The Complainant asserted that the record would have remained hidden had he not submitted the second OPRA request.

The Complainant stated that given the Custodian's twenty-five (25) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

The Complainant thus requested that the GRC: 1) determine that the Custodian's failure to respond in a timely manner resulted in a "deemed" denial; 2) order disclosure of all responsive records (and not those the Custodian "finds acceptable for the public to receive"); 3) determine that the Custodian knowingly and willfully violated OPRA, thereby warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) order any further relief deemed appropriate. He complained.

[5] The Complainant criticized that the GRC "unduly places the burden on [a requestor] to prove" that a custodian failed to disclose all responsive records. However, the GRC's long-standing case law supports that "credible evidence" must exist in the record to refute a custodian's certification that all records were provided. *See* Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2010-279 (Final Decision dated February 28, 2012); Ehmann v. Borough of Belmar (Monmouth), GRC Complaint No. 2014-281 (March 2015).

Statement of Information:

On June 23, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request "in January 2014." The Custodian certified that his search included reviewing OPRA requests that had been received and locating responsive records. The Custodian certified that he responded in writing on January 27, 2014, disclosing responsive records.

The Custodian contended that the instant complaint was frivolous because the Complainant was in receipt of all responsive records. The Custodian asserted that nondisclosure of Mr. Paff's request was the result of an oversight. The Custodian asserted that he inadvertently did not disclose Mr. Paff's request to the Complainant because it was on his computer and not printed out "due to holidays and [the] nature of the request." The Custodian argued that the Complainant's arguments have no merit here because he ultimately disclosed Mr. Paff's request to the Complainant. The Custodian asserted that the Complainant cannot argue that he never intended to disclose the record if he did just that in response to a subsequent OPRA request. The Custodian noted that this disclosure is the sole reason the Complainant filed the instant complaint. The Custodian requested that the GRC dismiss this complaint.

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).[6] 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 Complainant contended that the Custodian failed to respond in a timely manner. In the SOI, the Custodian certified that he received the Complainant's OPRA request "in January 2014." Thus, absent the Custodian certifying that he received the request on a specific date, the GRC is satisfied that the evidence of record supports that the Custodian received the Complainant's OPRA request on January 15, 2014. Based on the foregoing, the response time frame began on January 16, 2014, which represents the first (1st) business day after receipt of the request. *See* Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011). In the Denial of Access Complaint, the Complainant contended that the last business day to respond was January 24, 2014, but that the Custodian did not respond until January 27, 2014. However, the Complainant's time calculation ignores Martin Luther King, Jr., Day, a Federal holiday that

[6] 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.

all State, County, and municipal agencies observed on January 20, 2014. Thus, by the GRC's calculation, the seventh (7th) business day was January 27, 2014, the day the Custodian responded by granting access to responsive records.

Therefore, taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant's OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "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.

Insufficient Search

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); May v. Twp. of Edison (Middlesex), GRC Complaint No, 2007-165 (October 2007); Schneble v. NJ Dep't of Envtl. Prot., GRC Complaint 2007-220 (April 2008). Further, "it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3.

In Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an initially inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, the complainant submitted two (2) OPRA requests, one year apart, for the same records. The custodian conducted a search one year after the initial search and located the records in the same area, within an office that she admitted having searched a year earlier.

Moreover, in Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013), the custodian initially responded to the complainant's request, producing four (4) responsive records and stating that no other records existed. However, after receiving the denial of access complaint, the custodian performed another search and discovered several other records. In accordance with Schnebel, the Council held that the custodian failed to perform an adequate initial search and unlawfully denied access to those additional records. Id.

Here, the Complainant sought and the Custodian disclosed a number of responsive records within seven (7) business days. However, the Complainant submitted an unrelated OPRA request on April 25, 2015: the Custodian's response included an OPRA request (sent via e-mail) that was responsive to the OPRA request at issue here that he did not initially disclose. In the Denial of Access Complaint, the Complainant contended that the Custodian purposely withheld the record and never intended to disclose it because of its relevance to Verry, GRC 2015-57 *et seq.* Conversely, the Custodian certified in the SOI that his failure to disclose the record initially "was a mere oversight." The Custodian certified that he did not locate the record because he did not print it out "due to holidays and [the] nature of the request."

The Council's decision in Lebbing is applicable here. Specifically, the Custodian provided records on January 27, 2014; however, he somehow failed to locate on his computer Mr. Paff's clearly identified OPRA request. The Custodian subsequently located and disclosed to the Complainant Mr. Paff's OPRA request in response to another OPRA request that sought e-mails between Mr. Paff and the Custodian. The Custodian's failure to locate this easily identifiable record raises a question of whether he performed a search of his computer prior to disclosing records initially to the Complainant. However, the Custodian did not provide a detailed explanation of his search other than "reviewed OPRA requests." Thus, the evidence clearly supports that the Custodian conducted an insufficient response prior to disclosing responsive records to the Complainant.

Accordingly, the Custodian's initial failure to locate a record constitutes an insufficient search. Lebbing, GRC 2009-251. Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner, GRC 2013-52.

Abeyance of Complaint

The GRC begins by noting that the Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 *et seq.* Regarding the disclosability of OPRA request forms pursuant to an OPRA request, the Appellate Division is currently addressing that issue in Scheeler, Jr. v. Office of the Governor, *et al.*, Docket No. A-1236-14T3. There, defendants are arguing that they lawfully denied access to OPRA requests based on the court's holding in Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). The GRC notes that it has issued a few decisions regarding the disclosability of OPRA requests in the past. *See* Wolosky v. Twp. of Parsippany-Troy Hills (Morris), GRC Complaint No. 2010-317 (March 27, 2012); Anonymous v. NJ State Police, GRC Complaint No. 2014-78 (Interim Order January 30, 2015). However, the pending decision from the Appellate Division might affect the GRC's analysis on this issue going forward.

The Custodian's insufficient search raises the question of whether he performed a search on his computer for responsive records. However, should the GRC require the Custodian to perform a search of his computer and confirm whether any additional records exist, the issue of disclosability of OPRA requests would certainly come into play. The GRC has already held in abeyance other complaints regarding the disclosability of OPRA requests due to the pending Appellate Division action. *See* Scheeler, Jr. v. NJ Office of the Governor, GRC Complaint No. 2014-67 (Interim Order dated February 23, 2016).

Considering the prevailing question of disclosure currently being reviewed by the Appellate Division, the instant complaint should be held in abeyance pending a decision in Scheeler. Any decision to the contrary might lead to additional litigation and could entail unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved. *See, e.g.* Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-365 (September 2015).

Accordingly, the issue of whether the Custodian conducted a search for responsive OPRA requests on his computer should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Taking into account Martin Luther King, Jr., Day, the Custodian timely responded to the Complainant's OPRA request within seven (7) business days after receipt of same. N.J.S.A. 47:1A-6. As such, there was no "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's initial failure to locate a record constitutes an insufficient search. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011). Thus, the Custodian unlawfully denied access to at least one (1) additional record responsive to Complainant's OPRA request. N.J.S.A. 47:1A-6; Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013).

3. The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer should be held in abeyance until the Appellate Division has ruled on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, *et al.*, Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision to this complaint.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

June 21, 2016[7]

[7] This complaint was prepared for adjudication at the Council's June 28, 2016 meeting, but could not be adjudicated due to lack of quorum.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 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: July 27, 2016