



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

March 26, 2008 Government Records Council Meeting

Douglas Ehrenworth
Complainant

Complaint No. 2007-13

v.

Borough of Ridgely (Bergen)
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council (“Council”) considered the March 24, 2008 Supplemental 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, accepts the settlement as reached by the parties at the Office of Administrative Law.

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 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Janice Kovach



Government Records Council

Decision Distribution Date: March 27, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Douglas J. Ehrenworth, Esq.¹
Complainant**

GRC Complaint No. 2007-13

v.

**Borough of Ridgefield (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

1. All Council and Board meeting minutes pertaining to the condemnation or redevelopment of property located at 1 Bell Drive and in regard to the Overpeck Creek Redevelopment Plan,
2. Copy of the ordinance/resolution pertaining to the condemnation or redevelopment of property located at 1 Bell Drive and in regard to the Overpeck Creek Redevelopment Plan,
3. Copy of the planning report regarding the redevelopment area,
4. Copy of any maps regarding the redevelopment area,
5. Copy of the contract with the redeveloper,
6. Copy of the Workable Relocation Assistance Plan (“WRAP”),
7. Copy of the Borough of Ridgefield’s ordinances regarding the redevelopment and
8. Copies of any appraisals of the property located at 1 Bell Drive.

Request Made: September 7, 2006

Response Made: None

Custodian: Stewart V. Veale³

GRC Complaint Filed: December 13, 2006

Background

June 27, 2007

Government Records Council’s (“Council”) Interim Order. At its June 27, 2007 public meeting, the Council considered the June 20, 2007 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, found that:

¹ No representation listed on record.

² Represented by Douglas Doyle, Esq. of Edwards & Caldwell, LLC (Hawthorne, NJ).

³ Current Custodian is Martin Gobbo, who succeeded the Custodian of Record after the initial OPRA request.

1. The Custodian's failure to respond to the Complainant's September 7, 2006 request in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proof that the denial of access was authorized by law.
3. Because the original Custodian never provided a written response granting access, denying access, seeking clarification or requesting an extension within the statutorily mandated time frame as required by OPRA pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to release the records relevant to this request with the proper redactions, if necessary, to the Complainant after several attempts to resolve the situation prior to the Complainant's filing of a Denial of Access Complaint, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

August 6, 2007

Council's Interim Order distributed to the parties.

March 17, 2008

Office of Administrative Law ("OAL") Initial Decision Settlement. At a hearing on March 14, 2008 at the OAL, settlement discussions were held and a settlement was reached.

Analysis

Because a settlement was reached at OAL, no legal analysis is required on this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the settlement as reached by the parties at the Office of Administrative Law.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

March 24, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

INTERIM ORDER

June 27, 2007 Government Records Council Meeting

Douglas J. Ehrenworth, Esq.
Complainant

Complaint No. 2007-13

v.

Borough of Ridgfield (Bergen)
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 2007 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 as amended. The Council, therefore, finds that:

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond to the Complainant's September 7, 2006 request in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proof that the denial of access was authorized by law.
3. Because the original Custodian never provided a written response granting access, denying access, seeking clarification or requesting an extension within the statutorily mandated time frame as required by OPRA pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to release the records relevant to this request with the proper redactions, if necessary, to the Complainant after several attempts to resolve the situation prior to the Complainant's filing of a Denial of Access Complaint, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On the 27th Day of June 2007

Vincent Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 5, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2007 Council Meeting**

**Douglas J. Ehrenworth, Esq.¹
Complainant**

GRC Complaint No. 2007-13

v.

**Borough of Ridgefield (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

1. All Council and Board meeting minutes pertaining to the condemnation or redevelopment of property located at 1 Bell Drive and in regard to the Overpeck Creek Redevelopment Plan,
2. Copy of the ordinance/resolution pertaining to the condemnation or redevelopment of property located at 1 Bell Drive and in regard to the Overpeck Creek Redevelopment Plan,
3. Copy of the planning report regarding the redevelopment area,
4. Copy of any maps regarding the redevelopment area,
5. Copy of the contract with the redeveloper,
6. Copy of the Workable Relocation Assistance Plan (“WRAP”),
7. Copy of the Borough of Ridgefield’s ordinances regarding the redevelopment and
8. Copies of any appraisals of the property located at 1 Bell Drive.

Request Made: September 7, 2006

Response Made: None

Custodian: Stewart V. Veale³

GRC Complaint Filed: December 13, 2006

Background

September 7, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 13, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁴

¹ No representation listed.

² Represented by Douglas Doyle, Esq. (Ridgefield, NJ).

³ Current Custodian is Martin Gobbo, who succeeded the Custodian of Record after the initial OPRA request.

- Complainant's OPRA records request dated September 7, 2006
- Copy of mail receipt from the New Jersey Lawyers Service dated September 8, 2006

The Complainant states that he submitted an OPRA records request to the original Custodian on September 7, 2006 via the New Jersey Lawyers Service. The Complainant states that he never received a response despite receiving a signed acknowledgement of receipt from the New Jersey Lawyers Service.⁵ The Complainant also states that in at least seven (7) different attempts to communicate with the Custodian by telephone, either the Complainant received no response or the Custodian did not provide a written statement as to whether or not the records would be released.

The Complainant states that the Custodian's failure to respond to this OPRA request is considered a deemed denial pursuant to N.J.S.A. 47:1A-5.i.

January 8, 2007

Offer of Mediation sent to both parties.

January 9, 2007

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

January 11, 2007

Request for the Statement of Information sent to the Custodian.

January 25, 2007

E-mail from the GRC to the Custodian. The GRC states that, pursuant to the Custodian's telephone request for an extension of time, the Custodian's deadline for submission of the SOI is extended until January 30, 2007.

January 26, 2007

Letter from the Custodian to the Complainant. The Custodian states that all records responsive on file are prepared for pickup and that a photocopy fee of \$199.50 is due.

January 29, 2007

Letter from the Complainant to the Custodian. The Complainant states that the requested copying fee is enclosed for the records responsive and requests that the copies be forwarded to him.

February 15, 2007

Letter from the GRC to the Custodian. The GRC states that the Custodian has an additional three (3) business days to submit the SOI.

⁴ Complainant attaches additional material not relevant to this complaint.

⁵ New Jersey Lawyers Service is a private legal courier service that uses receipts similar to certified mail.
Douglas J. Ehrenworth v. Borough of Ridgefield (Bergen), 2007-13 – Findings and Recommendations of the Executive Director

February 21, 2007

Letter from the GRC to the Custodian. The GRC states that the Custodian has three (3) business days to submit a Statement of Information.

February 23, 2007

Custodian's Statement of Information with the following attachments:

- Complainant's OPRA records request dated September 7, 2006,
- Complainant's Denial of Access Complainant dated December 13, 2006 (with attachments),
- Letter from the Custodian to the Complainant dated January 26, 2007 and
- Letter from the Complainant to the Custodian dated January 29, 2007 (with attachment).

March 13, 2007

Letter from the GRC to the Custodian. The GRC states that the Custodian has not yet submitted a document index. The GRC advises the Custodian to provide both of these documents by March 20, 2007.

March 15, 2007

Letter from the Custodian to the GRC. The Custodian states that since he is the new clerk at the Borough of Ridgefield, he cannot explain why the records relevant to this request were not previously released to the Complainant. The Custodian further states that he has responded to the Complainant and provided approximately 800 pages of records to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides immediate access to “... budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“... [t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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. 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.

Further, OPRA provides that some government records, including contracts, must be made immediately accessible to a requestor. N.J.S.A. 47:1A-5.e. The Complainant requested a copy of a contract with a redeveloper. However, the current Custodian certified that this contract does not exist. The Custodian therefore, has not violated N.J.S.A. 47:1A-5.e. Nevertheless, the Custodian still had an obligation to respond in writing to Complainant’s OPRA request within the statutorily mandated seven (7) business days.

Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian should have granted access, denied access, sought clarification or requested an extension of the statutorily mandated time frame in writing to the Complainant’s September 7, 2006 OPRA request within seven (7) business days. The Custodian’s failure to respond in writing within the statutorily mandated response time resulted in a “deemed” denial. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Thomas v. Plainsfield Board of Education, GRC Complaint No. 2006-185 (December 2006).

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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.

The Complainant states that his September 7, 2006 OPRA request and several subsequent attempts to communicate with the Custodian by telephone failed to produce either the records or a response from the Custodian.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

Because the original Custodian never provided a written response granting access, denying access, seeking clarification or requesting an extension within the statutorily mandated time frame as required by OPRA pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to release the records relevant to this request with the proper redactions, if necessary, to the Complainant after several attempts to resolve the situation prior to the Complainant’s filing of a Denial of Access Complaint, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied 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 to the Complainant's September 7, 2006 request in writing within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial, thus violating N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne his burden of proof that the denial of access was authorized by law.
3. Because the original Custodian never provided a written response granting access, denying access, seeking clarification or requesting an extension within the statutorily mandated time frame as required by OPRA pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failed to release the records relevant to this request with the proper redactions, if necessary, to the Complainant after several attempts to resolve the situation prior to the Complainant's filing of a Denial of Access Complaint, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

June 20, 2007