



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

October 31, 2007 Government Records Council Meeting

James Keelen
Complainant

Complaint No. 2007-141

v.

City of Long Branch (Monmouth)
Custodian of Record

At the October 31, 2007 public meeting, the Government Records Council (“Council”) considered the October 24, 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, finds that:

1. The Custodian failed to provide the Complainant with a written response granting access, denying access, requesting clarification or requesting an extension of time within the statutorily mandated seven (7) business days. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., thereby creating a “deemed” denial.
2. The evidence of record does not support a conclusion that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The Custodian forwarded the request to the Director of Building and Development, who found no records responsive existed. However, the Custodian’s actions in failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with OPRA.

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 31st Day of October, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman
Government Records Council

Decision Distribution Date: November 16, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 31, 2007 Council Meeting**

**James Keelen¹
Complainant**

GRC Complaint No. 2007-141

v.

**City of Long Branch (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

All Environment Protection Agency (“EPA”) permits for construction on the beach including heavy equipment.

Request Made: May 22, 2007

Response Made: June 11, 2007

Custodian: Irene Joline

GRC Complaint Filed: July 11, 2007

Background

May 22, 2007

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.

June 11, 2007

Custodian’s Response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the twelfth (12th) business day following receipt of such request. The Custodian forwards the Complainant his original OPRA request form on which the Director of Building and Development, Kevin Hayes, noted that he is not aware that any such permits exist.

June 11, 2007³

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated May 22, 2007. ⁴

¹ No legal representation listed on record.

² Represented by Ansell, Zaro, Grimm & Aaron, LLC (Ocean, NJ).

³ The Complainant dated the Denial of Access Complaint for July 11, 2007, but sent the Denial of Access Complaint to the GRC on June 11, 2007. The Complainant dated his facsimile cover letter as June 11, 2007.

⁴ The Complainant attached additional correspondence and newspaper articles which are not relevant to the Denial of Access Complaint.

The Complainant asserts that he submitted his OPRA request form on May 22, 2007 and to this date has not received a response.

June 14, 2007

Offer of Mediation sent to both parties.

June 21, 2007

The Custodian agreed to mediate this complaint. The Complainant did not respond to the Offer of Mediation.

June 28, 2007

Request for the Statement of Information sent to the Custodian.

July 3, 2007

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated May 22, 2007, which includes a notation of the Director of Building and Development, Kevin Hayes, dated June 11, 2007.⁵

The Custodian asserts that the City of Long Branch received the Complainant's OPRA request on May 22, 2007. The Custodian also asserts that Mr. Hayes responded to the Complainant on June 11, 2007. The Custodian also asserts that Mr. Hayes conducted a search for EPA permits for construction on the beach but could not find any within the three (3) week period between the receipt of the Complainant's OPRA request and the date of the response.

The Custodian contends that the City of Long Branch has complied in all respects with OPRA in responding to the Complainant's request. The Custodian also contends that the OPRA request is for information that requires the City to perform research in order to properly respond. The Custodian further contends that the request has no time delineations and seeks no specific type of permit.

The Custodian asserts that the request is improper under OPRA since it requires research to be done and the request is not document specific. The Custodian also asserts that instead of responding in this regard, the Custodian went to Mr. Hayes, who in return conducted a search for any permits that might be responsive to the request and concluded that no permits existed. The Custodian further asserts that this issue raises the question of whether the City would be in possession of EPA permits in the first place.

The Custodian contends that the City fully complied with an improper request made by the Complainant.

July 23, 2007

Letter from the GRC to the Custodian. The GRC acknowledges that the Custodian certified in the SOI that the Complainant submitted his OPRA request on May 22, 2007 and that the Director of Building and Development, Kevin Hayes, responded to the request on June 11, 2007 indicating that he was not aware of any such permits existing. The GRC also acknowledges that during a telephone call with the Custodian,

⁵ The Custodian attached additional correspondence which is not relevant to adjudication.

the Custodian indicated that she forwarded the request to Mr. Hayes on May 22, 2007 and again to his secretary on June 6, 2007 after the Custodian did not receive a response from Mr. Hayes.

The GRC requests that the Custodian provide a legal certification for the statements above within three (3) business days because the Custodian did not include this information within her Statement of Information. The GRC also requests that Mr. Hayes send a legal certification stating that no records responsive to the Complainant's OPRA request exist.

July 26, 2007

Letter from the Custodian to the GRC.⁶ The Custodian certifies that on May 22, 2007 the Complainant submitted his OPRA request; the OPRA request was forwarded to Mr. Hayes on the same day, and again on June 6, 2007 to his secretary after no response was received from Mr. Hayes. The Custodian also certifies that Mr. Hayes' response was received by her office on June 11, 2007.

July 26, 2007

Letter from the Director of Building and Development, Kevin Hayes Sr., to the GRC.⁷ The Director certifies that, as indicated on the OPRA request form, he is not aware that any EPA permits for construction on the beach in the City of Long Branch exist.⁸

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

⁶ The Custodian's letter is dated July 23, 2007.

⁷ The Director of Building and Development's letter is dated July 24, 2007.

⁸ Custodian's Counsel sent an additional letter to the GRC that was not relevant to this adjudication. James Keelen v. City of Long Branch (Monmouth), 2007-141 – Findings and Recommendations of the Executive Director

“...[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.

The Complainant asserts that he submitted an OPRA request to the Custodian on May 22, 2007 and as of the date on his Denial of Access Complaint, he has not received a response.

The Custodian certifies that on May 22, 2007 the Complainant submitted his request; on the same day said request was forwarded to the Director of Building and Development, Kevin Hayes, and again to his secretary on June 6, 2007 after not receiving a response. The Custodian also certifies that Mr. Hayes’ response was received by her office on June 11, 2007 indicating that he is not aware that any such permits exist.

Additionally, the Custodian asserts that the Complainant’s OPRA request was improper under OPRA since it requires research to be done and the request is not document specific. However, the Complainant’s OPRA request was not so improper that Mr. Hayes did not know which records for which to search.

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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

OPRA requires that a custodian respond in writing to an OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business day time frame. N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See also Kelley v. Rockaway Twp, GRC Complaint No. 2006-176 (March 2007). Additionally, failure to respond to an OPRA request in writing within seven (7) business days results in a deemed denial of access. N.J.S.A. 47:1A-5.i.

In a prior GRC decision, Skinner v. City of Cape May, GRC Complaint No. 2007-85 (April 2007), the Council found that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.

In this complaint, the Complainant asserts that he did not receive a response in writing within the statutorily mandated seven (7) business days required by OPRA. The Custodian asserts that the request was forwarded to the City’s Director of Building and Development, who responded in writing on June 11, 2007, stating that no records responsive to the request exist. As such, the Custodian failed to provide the Complainant with a written response granting access, denying access, requesting clarification or requesting an extension of time within the statutorily mandated seven (7) business days. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., thereby creating a “deemed” denial.

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.

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).

The evidence of record does not support a conclusion that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The Custodian forwarded the request to the Director of Building and Development, who found no records responsive existed. However, the Custodian’s actions in failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days appear negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to provide the Complainant with a written response granting access, denying access, requesting clarification or requesting an

extension of time within the statutorily mandated seven (7) business days. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., thereby creating a “deemed” denial.

2. The evidence of record does not support a conclusion that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The Custodian forwarded the request to the Director of Building and Development, who found no records responsive existed. However, the Custodian’s actions in failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with OPRA.

Prepared By:

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Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 24, 2007