



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

March 25, 2009 Government Records Council Meeting

Sharon Zappia
Complainant

Complaint No. 2007-260

v.

City of Atlantic City (Atlantic)
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 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 June 28, 2006 OPRA request and the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business days to the Complainant’s June 14, 2007 OPRA request resulted in “deemed” denials of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that no additional records responsive to the Complainant’s June 14, 2007 OPRA request exist, and there is no credible evidence in the record to refute the Custodian’s certification, therefore, while the Custodian violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The GRC does not have jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b. and Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Although the Custodian’s failure to provide a written response to the Complainant’s June 28, 2006 OPRA request and the Custodian’s failure to provide a written response within the statutorily mandated seven (7) business



days to the Complainant's June 14, 2007 OPRA request resulted in "deemed" denials, because the Custodian provided the Complainant with the records requested in the June 28, 2006 OPRA request and provided the only records which could be found in response to the June 14, 2007 OPRA request nineteen (19) days following the date of the Complainant's request, and the Custodian provided a memorandum which explained why records could not be found, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the 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 25th Day of March, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: March 30, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2009 Council Meeting**

**Sharon Zappia¹
Complainant**

GRC Complaint No. 2007-260

v.

**City of Atlantic City (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

- June 28, 2006 OPRA Request: City Council meeting minutes dated June 14, 2006.³
- June 14, 2007 OPRA Request:
 1. All building permits issued to the following companies from January 1, 2006 to present:
 - a. Atlantic City Quality Roofing and Siding
 - b. Absecon Roofing Company
 - c. Atlantic Coast Roofing and Sheet Metal Company
 - d. Atlantic City Quality Exteriors⁴

Request Made: June 28, 2006 and June 14, 2007

Response Made: July 7, 2006 and July 12, 2007

Custodian: Rhonda Williams⁵

GRC Complaint Filed: October 24, 2007⁶

Background

June 28, 2006

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

July 7, 2006

Custodian's response to the OPRA request.⁷ The Custodian responds to the Complainant's OPRA request on the fifth (5th) business day following receipt of such

¹ No legal representation listed on record.

² Represented by Jack Berenato, Esq. (Atlantic City, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁴ The Complainant requested additional records, however, said records are not the subject of this Denial of Access Complaint.

⁵ The Custodian at the time of the Complainant's OPRA request was Rosemary Adams.

⁶ The GRC received the Denial of Access Complaint on said date.

request.⁸ The Custodian provides the Complainant access to the requested meeting minutes.

June 14, 2007

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

June 21, 2007

Memorandum from Arlene Rice, Clerk Typist, to Custodian. The Clerk Typist states that in response to the Complainant's OPRA request, she will fax information regarding contractor Dick Sykes to the Custodian. The Clerk Typist also states that there are no other records responsive to the Complainant's request.

July 12, 2007

Custodian's response to the OPRA request. The Custodian responds verbally to the Complainant's OPRA request on the nineteenth (19th) business day following receipt of such request. The Custodian provides the Complainant access to permits issued to Dick Sykes Roofing.

August 20, 2007

Memorandum from Construction Official to Custodian. The Construction Official states that no permits have been issued to the list of contractors requested by the Complainant. The Construction Official also states that the permit system does not use contractor name as the primary means to track permits. The Construction Official states that he may be able to locate more information if either street addresses or block and lot numbers were supplied.

October 24, 2007

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

- Complainant's OPRA request dated June 28, 2006
- Complainant's OPRA request dated June 14, 2007
- Memorandum from Arlene Rice, Clerk Typist, to Custodian dated June 21, 2007
- Memorandum from Construction Official to Custodian dated August 20, 2007⁹

The Complainant states that she submitted an OPRA request on June 28, 2006 for a copy of the City Council's meeting minutes dated June 14, 2006. The Complainant claims that the minutes the Custodian provided were inaccurate. The Complainant states that she informed the Custodian that the written minutes did not match the video tape of the meeting. The Complainant states that a few days later the Custodian provided her with amended meeting minutes that matched the video tape of the June 14, 2006 meeting.

⁷ The evidence of record does not indicate whether said response was written or verbal.

⁸ The original Custodian certifies that she received said request on June 29, 2008. See certification dated September 30, 2008.

⁹ The Complainant attaches additional records; however, said records are not relevant to the adjudication of this Denial of Access Complaint.

The Complainant asserts that the City is altering and/or not disclosing records in an attempt to cover up illegal activities.

Additionally, the Complainant states that she submitted another OPRA request on June 14, 2007. The Complainant states that the Clerk's Office informed her that it had not received any response to the Complainant's request from the Construction Department. The Complainant states that she called the Construction Department and someone informed her that the Department had responded to the Clerk's Office by June 21, 2007 and could not explain why the Clerk's Office represented otherwise. The Complainant states that on July 12, 2007 she was provided with permits issued in 2004, although her request was for permits issued from 2006 to present. The Complainant states that she resubmitted her request and received the August 20, 2007 Memorandum from the Construction Official two (2) weeks later indicating that the permit system did not allow searches for permits by builder's name and/or phone number.

October 25, 2007

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

November 7, 2007

Request for the Statement of Information ("SOI") sent to the Custodian.

November 15, 2007

Custodian's incomplete SOI.

November 16, 2007

Letter from the GRC to the Custodian. The GRC returns the Custodian's incomplete SOI and states that the Custodian must promptly correct the deficiencies. Specifically, the GRC states that the Custodian failed to complete the document table in Item # 9 of the SOI as is required by Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007). Further, the GRC advises the Custodian that the GRC will only return the incomplete SOI once and that if the SOI remains incomplete, the GRC will adjudicate the matter based only on information submitted in the Denial of Access Complaint. The Custodian is informed that the deadline for returning a compliant SOI is November 21, 2007.

November 21, 2007

Custodian resubmits her SOI with the Complainant's OPRA request dated June 14, 2007 attached.¹⁰ The Custodian certifies that she received the Complainant's OPRA request on June 14, 2007. The Custodian also certifies that she responded to the Complainant's request on July 14, 2007.¹¹ Additionally, the Custodian certifies that there are no records responsive to the Complainant's request for building permits issued to the list of contractors from January 1, 2006 to present.

¹⁰ The Custodian attaches additional records; however, said records are not relevant to the adjudication of this Denial of Access Complaint.

¹¹ Although the Custodian certifies that she responded on July 14, 2007 (which was a Saturday), the OPRA request form attached to the SOI notes Custodian's verbal response on July 12, 2007.

November 26, 2007

The Complainant's response to the Custodian's SOI. The Complainant states that the Custodian failed to address her June 28, 2006 OPRA request for meeting minutes. The Complainant states that the Custodian also failed to include a copy of the memorandum from the Construction Official to the Custodian which indicated that the permit system does not allow searches for permits based on the contractor's name.

September 15, 2008

E-mail from GRC to Complainant. The GRC states that the portion of the Complainant's Denial of Access Complaint regarding the Complainant's June 28, 2006 request is cut off at the bottom. The GRC asks the Complainant to resubmit said page. Additionally, the GRC asks the Complainant to identify the dates on which she received responses to her OPRA requests which are the subject of this Denial of Access Complaint.

September 15, 2008

E-mail from GRC to Custodian. The GRC states that the Complainant's Denial of Access Complaint addresses the Complainant's OPRA request dated June 28, 2006. The GRC states that the Custodian failed to address said request in her SOI. As such, the GRC attaches an SOI form for the Custodian to complete regarding said request. Additionally, the GRC requests that the Custodian certify as to what search was undertaken to determine if any records exist which are responsive to the Complainant's OPRA request dated June 14, 2007.

September 19, 2008

E-mail from Complainant to GRC. The Complainant states that she does not know the exact date on which she received a response to her OPRA request dated June 28, 2006; however, the Complainant contends that it was several weeks after she submitted said request. Additionally, the Complainant states that her OPRA request dated June 14, 2007 was denied on the basis that the permit system could not access building permits using contractor or business names.

September 30, 2008¹²

Custodian's certification regarding the Complainant's OPRA request dated June 26, 2006. The original Custodian certifies that she received the Complainant's OPRA request on June 29, 2006. The original Custodian certifies that on July 7, 2006 the requested meeting minutes were provided to the Complainant. The original Custodian states that the Complainant alleges the minutes provided to her are inaccurate. The original Custodian certifies that she made an inquiry to Patricia Anne Parker, Notary Public of the State of New Jersey who transcribed the June 14, 2008 meeting, who indicated that the meeting minutes provided to the Complainant are accurate. Additionally, the original Custodian certifies that she is unaware of any subsequent request for said meeting minutes, as alleged by the Complainant.

¹² The original Custodian erroneously cites to dates in 2008 instead of 2006. However, the original Custodian clarifies the dates in a certification dated October 2, 2008.

September 30, 2008¹³

Certification of Deborah Cruz, Technical Assistant/Office Supervisor for the Division of Construction. The Technical Assistant certifies that she performed the search for records responsive to the Complainant's OPRA request dated June 14, 2007. The Technical Assistant certifies that the permit system does not use the name of the company or contractor as a means to track permits. The Technical Assistant certifies that said system tracks permits by street address, block and lot numbers, federal identification number or telephone number. The Technical Assistant certifies that she performed a search based on the telephone numbers provided by the Complainant and found no building permits responsive to the Complainant's request. However, the Technical Assistant certifies that by using the telephone number the Complainant provided for Absecon Roofing Company, she located permits issued to Dick Sykes Roofing which were provided 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 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. 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.

¹³ Additional correspondence was submitted by the parties; however, said correspondence is not relevant to the adjudication of this Denial of Access Complaint.

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. As also prescribed under 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. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The evidence of record indicates that the Custodian responded to the Complainant's June 28, 2006 OPRA request on July 7, 2006, the fifth (5th) business day following receipt thereof, providing access to the requested record. However, the evidence does not indicate whether the Custodian's response was written or verbal.

Further, the evidence of record indicates that the Custodian responded verbally to the Complainant's June 14, 2007 OPRA request on June 12, 2007, the nineteenth (19th) business day following receipt thereof, providing access to permits issued to Dick Sykes Roofing.

Therefore, the Custodian's failure to respond in writing to the Complainant's June 28, 2006 OPRA request and the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days to the Complainant's June 14, 2007 OPRA request resulted in "deemed" denials of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Also, with regard to her June 14, 2007 OPRA request, the Complainant alleges that because permits were produced for dates prior to January 1, 2006, the Custodian is withholding records for dates after January 1, 2006 by claiming that records cannot be accessed by the use of contractors' names.

However, Deborah Cruz, Technical Assistant, certifies that the permit system does not use the name of the company or contractor as a means to track permits. Ms. Cruz certifies that she performed a search based on the telephone numbers provided on Complainant's June 14, 2007 OPRA request form and located permits issued to Dick Sykes Roofing using the telephone number the Complainant provided for Absecon Roofing Company. The Custodian and Ms. Cruz certify that no additional records responsive to the Complainant's June 14, 2007 OPRA request exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified that no additional records responsive to the Complainant's June 14, 2007 OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer, supra.

Whether the Government Records Council has jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b.?

OPRA provides that:

“[t]he Government Records Council shall... receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7.b.

The Complainant claims that the minutes of the June 14, 2006 City of Atlantic City Council meeting, which were initially disclosed in response to her June 28, 2006 OPRA request, were inaccurate and that the Custodian knowingly provided inaccurate meeting minutes to cover up illegal activity. The Complainant states that she received accurate meeting minutes after repeating her request.

In Kwanzaa v. Department of Corrections, GRC Complaint No.2004-167 (March 2005), the custodian provided the requested document, but the complainant disputed the accuracy of the information in the document. The Council held that “...the Council does not oversee the content of documentation. The Council does oversee the disclosure and nondisclosure of documents.”

In this complaint, the Complainant claims that the minutes of the July 14, 2006 City of Atlantic City Council meeting which were initially disclosed by the Custodian were inaccurate. The Custodian certifies that the meeting minutes which were produced are accurate. Further, the Complainant states that she did eventually receive accurate meeting minutes. However, the GRC does not have jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b. and Kwanzaa v. Department of Corrections, GRC Complaint No.2004-167 (March 2005).

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, 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, 107 (App. Div. 1996).

Although the Custodian’s failure to provide a written response to the Complainant’s June 28, 2006 OPRA request and the Custodian’s failure to provide a written response within the statutorily mandated seven (7) business days to the Complainant’s June 14, 2007 OPRA request resulted in “deemed” denials, because the Custodian provided the Complainant with the records requested in the June 28, 2006 OPRA request and provided the only records which could be found in response to the June 14, 2007 OPRA request nineteen (19) days following the date of the Complainant’s request, and the Custodian provided a memorandum which explained why records could not be found, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 June 28, 2006 OPRA request and the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business days to the Complainant’s June 14, 2007 OPRA request resulted in “deemed” denials of the Complainant’s OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that no additional records responsive to the Complainant’s June 14, 2007 OPRA request exist, and there is no credible

evidence in the record to refute the Custodian's certification, therefore, while the Custodian violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. The GRC does not have jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b. and Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's June 28, 2006 OPRA request and the Custodian's failure to provide a written response within the statutorily mandated seven (7) business days to the Complainant's June 14, 2007 OPRA request resulted in "deemed" denials, because the Custodian provided the Complainant with the records requested in the June 28, 2006 OPRA request and provided the only records which could be found in response to the June 14, 2007 OPRA request nineteen (19) days following the date of the Complainant's request, and the Custodian provided a memorandum which explained why records could not be found, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Elizabeth Ziegler-Sears, Esq.
Case Manager/Staff Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

March 18, 2009