



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

April 30, 2008 Government Records Council Meeting

Kathleen Fallstick
Complainant

Complaint No. 2007-264

v.

NJ Department of Community Affairs,
Division of Local Government Services
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. The Council, therefore, finds that:

1. Because the Custodian failed to provide a written response to the Complainant’s August 20, 2007 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant’s OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian certified that there is no record responsive to the OPRA request that exist for the Haddon Township Housing Authority audit for 2006 the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1 and Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005) and Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with the existing records approximately eight (8) business days following the date of the Complainant’s request, 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 he 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 30th Day of April, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 13, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Kathleen Fallstick¹
Complainant**

GRC Complaint No. 2007-264

v.

**NJ Department of Community Affairs, Division of Local Government Services²
Custodian of Records**

Records Relevant to Complaint: Copies of audits on file with the State of New Jersey for the Haddon Township Housing Authority for years 2004, 2005 and 2006.

Request Made: August 20, 2007

Response Made: September 10, 2007

Custodian: Marc Pfeiffer

GRC Complaint Filed: October 29, 2007

Background

August 20, 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.

September 10, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request.³ The Custodian states that copies of audits of the Haddon Township Housing Authority for years 2004 and 2005 are available upon payment by the Complainant of a \$25.50 copying charge. The Custodian informs the Complainant that the 2006 audit of the Haddon Township Housing Authority is not yet available.

October 23, 2007

E-mail from the Custodian to the Complainant. The Custodian requests a reply to his e-mail dated September 10, 2007.

¹ No legal representation listed on record.

² Represented by DAG Daniel Reynolds, on behalf of the New Jersey Attorney General.

³ The Custodian certifies that the Complainant's OPRA request was received on August 28, 2007 (September 3, 2007 was a State holiday).

October 29, 2007

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

- Letter from the Complainant to the DCA Division of Housing dated August 6, 2007
- Letter from the DCA Division of Housing to the Complainant dated August 9, 2007
- Complainant’s OPRA request dated August 20, 2007
- E-mail from the Complainant to the Custodian dated September 25, 2007

The Complainant contends that audits of government entities are to be on record with the DCA Division of Local Government Services. The Complainant succinctly states that her OPRA request for such records, as well as a follow-up e-mail, went unanswered.

November 1, 2007

Offer of Mediation sent to both parties.

November 7, 2007

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

November 14, 2007

E-mail from the Complainant to the Custodian. The Complainant makes reference to the Custodian’s October 23, 2007 e-mail and informs the Custodian that she never received an e-mail from the Custodian dated September 10, 2007 and requests a copy be forwarded to her. The Complainant also informs the Custodian that before she remits a check to cover copying costs she wants to confirm the copies of the requested records have been signed by the proper authorities.

November 15, 2007

Request for the Statement of Information sent to the Custodian.

November 26, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the records responsive to her request are signed official documents filed with the Division of Local Government Services. The Custodian further informs the Complainant that he is following up with the Haddon Township Housing Authority regarding the status of the delinquent 2006 audit. The Custodian included a copy of his September 10, 2007 e-mail to the Complainant as an attachment.

⁴ The Complainant’s letter of August 6, 2007 inquires as to the proper DCA office in which to file her OPRA request. The letter dated August 9, 2007 answers the Complainant’s query. The Complainant’s letter dated September 25, 2007 seeks a reply from the Custodian regarding another OPRA request. None of the aforementioned correspondence is relevant to the substance of the instant complaint.

November 26, 2007

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 20, 2007
- E-mail from the Custodian to the Complainant dated September 10, 2007

The Custodian certifies that his search for the requested records involved directing the employee(s) who maintained actual physical custody of the requested records to locate any records that may have been responsive to the Complainant's request. The employee(s) located the 2004 and 2005 audit records and counted the pages to facilitate calculation of the copying cost.

The Custodian also certifies that the records responsive to the request have not been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, which requires the records to be retained for six (6) years.

The Custodian further certifies that two (2) records responsive to the Complainant's request are available. The available records are the audits of the Haddon Township Housing Authority for years 2004 and 2005. The Custodian certifies the audit of the Haddon Township Housing Authority for 2006 is not yet available. The Custodian also certifies that he responded to the Complainant's OPRA request on September 10, 2007, but that he had not received payment from the Complainant for the copying costs as of the date of this certification. In the Custodian's September 10, 2007 response he informed the Complainant that the two (2) audits totaled seventy-two (72) pages and the cost to copy the records was \$25.50. The Custodian further informed the Complainant that he would mail copies of the two (2) records responsive to the Complainant's request once payment was received for the copying costs.

November 27, 2007

E-mail from the Complainant to the Custodian. The Complainant states that the Custodian's November 26, 2007 e-mail did not contain the Custodian's September 10, 2007 e-mail as an attachment. The Complainant requests the Custodian send a copy of the September 10, 2007 e-mail as a Portable Document Format ("PDF") attachment.

November 27, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he has complied with her e-mail request of this date and that a PDF is attached.

November 27, 2007

E-mail from the GRC to the Complainant. The GRC forwards a copy of the Custodian's SOI to the Complainant, and advises the Complainant that, if she so desires, she may withdraw her complaint once she has paid for and received the conforming records that she requested.

December 12, 2007

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that she is sending payment for copying costs of the two (2) records responsive to her request. The Complainant also asks the Custodian if the 2006 Haddon Township Housing Authority audit has been received by the Division of Local Government Services.

December 16, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the 2006 Haddon Township Housing Authority audit is still not available.

February 6, 2008

E-mail from the GRC to the Complainant. The GRC informs the Complainant that they have not yet been advised whether the Complainant has paid for and received the records responsive to the complaint. The GRC further informs the Complainant that she is only entitled to records that the Custodian possessed as of the date of her request and that the 2006 Haddon Township Housing Authority audit was not available as of that date. The GRC advises the Complainant that if all other issues have been settled, her complaint can be resolved either by her withdrawal of the complaint or by GRC adjudication of the complaint. The Complainant was advised that the complaint would be adjudicated if she did not advise the GRC otherwise within a two week period.

Analysis

Whether the Custodian's response to the OPRA request was timely?

OPRA 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 therefore ...” N.J.S.A. 47:1A-5.g.

OPRA also 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 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.⁵ A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2006-176 (March 2007).

The Custodian certifies that he received the Complainant’s OPRA request on August 28, 2007 and responded to the request on September 10, 2007. Allowing for one intervening weekend and a State holiday, the Custodian failed to grant or deny access to the requested records until the eighth (8th) business day following receipt of the Complainant’s request. If the Custodian required clarification of the request or needed an extension of time he should have requested it within the statutorily mandated seven (7) business day period. See Kelley, supra, and Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).

Because the Custodian failed to provide a written response to the Complainant’s August 20, 2007 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant’s OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

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:

⁵ It is the GRC’s position that 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.

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

In the Custodian’s September 10, 2007 correspondence to the Complainant, the Custodian informed the Complainant that copies of the audits for years 2004 and 2005 would be disclosed upon payment of the copying costs. With respect to the 2006 audit, however, the Custodian certifies that there is no record responsive to the request.

Pursuant to N.J.S.A. 47:1A-1.1, a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency’s] official business ...”. Here, the Custodian has certified that the Haddon Township Housing Authority audit for 2006 was not received in the course of the agency’s official business, and there is no contravening evidence in the record proving otherwise. It is well settled that when a custodian certifies that a record is not “made, maintained, or kept on file,” there is no unlawful denial of access with respect to such record. This is in accord with the Council’s decision in Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), where the Council found that “[t]he Custodian certified that the records responsive to the request do not exist; therefore, there was no unlawful denial of access.” See also Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005) and Van Pelt v. Edison Township Board of Education (Middlesex), GRC Complaint No. 2007-179 (January 2008).

Accordingly, because the Custodian certified that there is no record responsive to the OPRA request that exist for the Haddon Township Housing Authority audit for 2006, the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. and Pusterhofer, Renna and Van Pelt, each cited *supra*.

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).

Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian provided the Complainant with the existing records approximately eight (8) business days following the date of the Complainant’s request, 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 he 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. Because the Custodian failed to provide a written response to the Complainant’s August 20, 2007 OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, requesting an extension or seeking clarification of the request, the Complainant’s OPRA request was deemed denied. Therefore, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Custodian certified that there is no record responsive to the OPRA request that exist for the Haddon Township Housing Authority audit for 2006 the Custodian did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1 and Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005) and Van Pelt v. Edison

Township Board of Education (Middlesex), GRC Complaint No. 2007-179
(January 2008).

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with the existing records approximately eight (8) business days following the date of the Complainant's request, 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 he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008