



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Nick Sunday
Complainant

Complaint No. 2008-11

v.

City of Paterson (Passaic)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 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 provide the requested records on the date stated or respond in writing requesting a further extension of time on or before the date set forth in the first (1st) extension of time to respond to Complainant’s request 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) and Kohn v Township of Livingston Library, GRC Complaint No. 2007-124 (March 2008).
2. Because the Custodian certified in the Statement of Information that no records responsive existed at the time of the Complainant’s request, and there is no credible evidence 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 is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s failure to provide the requested records on the date stated or provide a written response seeking a further extension of time to respond to the Complainant’s OPRA request resulted in a “deemed” denial, because the Custodian responded in writing seeking an extension of time the first (1st) day after receiving the request and ultimately certified that no records responsive could 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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
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: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Nick Sunday¹
Complainant**

GRC Complaint No. 2008-11

v.

**City of Paterson (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Documents pertaining to the City of Paterson's acquisition of the fountain that stood at the entrance of the Gorney & Gorney Funeral Home and which was installed in Eastside Park in approximately 2006.

Request Made: November 13, 2007

Response Made: November 14, 2007

Custodian: Jane E. Williams-Warren

GRC Complaint Filed: January 9, 2008³

Background

November 13, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form.

November 14, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian confirms that the Complainant consented to extend the time to respond to the OPRA request until December 3, 2007.

December 4, 2007

Letter from the Custodian to the Complainant. The Custodian confirms that the Complainant consented to further extend the time to respond to the OPRA request until December 10, 2007.

¹ No legal representation listed on record.

² Represented by Allen Zaks, Esq., of the office of the City of Paterson Corporation Counsel (Paterson, NJ).

³ The GRC received the Denial of Access Complaint on said date.

December 7, 2007

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that there are no documents on file in response to the OPRA request.

January 9, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”). The Complainant attaches his OPRA request dated November 13, 2007.

The Complainant asserts that there must be documents related to the City of Paterson’s acquisition, removal, restoration and installation of the fountain that stood for many years at the entrance of the Gorney & Gorney Funeral Home. Further, the Complainant states that he went to the Custodian’s office after receiving the December 7, 2007 letter stating that no records exist in response to his request. The Complainant alleges that personnel in the Custodian’s office suggested that he ask the Mayor for the records. The Complainant alleges that she spoke to the Mayor’s secretary but did not receive a response from the Mayor.

The Complainant did not agree to mediate this complaint.

January 15, 2008

Request for the Statement of Information sent to the Custodian.

January 18, 2008

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated November 13, 2007.
- Letter from the Custodian to the Complainant dated November 14, 2007.
- Letter from the Custodian to the Mayor, Business Administrator, and Director of Department of Public Works forwarding the Complainant’s OPRA request dated November 15, 2007.
- Letter from the Custodian to the Complainant dated December 4, 2007.
- Letter from the Custodian to the Complainant dated December 7, 2007.

The Custodian certifies that her search for the requested records involved sending the request to the Mayor, Business Administrator and Director of Public Works who each replied that they are not aware of the existence of documents regarding the receipt of the gifted statue. The Custodian certifies that the City of Paterson is not aware of the existence of the requested documents.⁴

Analysis**Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

⁴ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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“...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 also states 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 ... If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Further, 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...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (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. 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.

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).

Additionally, N.J.S.A. 47:1A-5.i. provides that a custodian must inform the requestor when the requested records will be made available and failure to provide the records by such date results in a "deemed" denial. *See* Kohn v. Township of Livingston Library, GRC Complaint No. 2007-124 (March 2008) which held that because the custodian failed to provide access to the requested records by the extension date, the custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to the records.

In this matter before the Council, the Custodian responded in writing on the first (1st) business day following receipt of the Complainant's OPRA request confirming the Complainant's consent to extend the time to respond to the request until December 3, 2007. However, the Custodian did not respond in writing until December 4, 2007 seeking a further extension of time. On December 4, 2007, the Custodian wrote to the Complainant confirming the Complainant's consent to further extend the time to respond to the request until December 10, 2007. The Custodian responded in writing on December 7, 2007 stating that there are no documents on file which are responsive to the OPRA request.

Pursuant to N.J.S.A. 47:1A-5.i., if the requested record cannot be made available within seven (7) business days, the custodian must advise the requestor when the record can be made available. If the custodian fails to provide the records by the extension date, the custodian is in violation of N.J.S.A. 47:1A-5.i. and access is "deemed" denied. *See* Kohn, supra.

Therefore, the Custodian's failure to provide the requested records on the date stated or respond in writing requesting a further extension of time on or before the date set forth in the first (1st) extension of time to respond to Complainant's request 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), and Kohn v Township of Livingston Library, GRC Complaint No. 2007-124 (March 2008).

Also in this matter, the Complainant asserts that documents related to the fountain should exist. Conversely, the Custodian certifies that the City of Paterson is unable to locate any documents which respond to the Complainant's OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone 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 in the SOI that no records responsive existed at the time of Complainant's request, 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 Custodian's deemed denial 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 the requested records on the date stated or provide a written response seeking a further extension of time to respond to the

Complainant's OPRA request resulted in a "deemed" denial, because the Custodian responded in writing seeking an extension of time the first (1st) day after receiving the request and ultimately certified that no records responsive could 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 provide the requested records on the date stated or respond in writing requesting a further extension of time on or before the date set forth in the first (1st) extension of time to respond to Complainant's request 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) and Kohn v Township of Livingston Library, GRC Complaint No. 2007-124 (March 2008).
2. Because the Custodian certified in the Statement of Information that no records responsive existed at the time of the Complainant's request, and there is no credible evidence 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 is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to provide the requested records on the date stated or provide a written response seeking a further extension of time to respond to the Complainant's OPRA request resulted in a "deemed" denial, because the Custodian responded in writing seeking an extension of time the first (1st) day after receiving the request and ultimately certified that no records responsive could 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

April 22, 2009