



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 25, 2009 Government Records Council Meeting

William Osterman
Complainant

Complaint No. 2008-12

v.

City of Trenton (Mercer)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 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. Custodian Conti’s failure to respond in writing to the Complainant’s OPRA request 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).
2. Because the evidence of record reveals that Custodian Conti determined no records responsive to the Complainant’s OPRA request existed, Custodian Conti did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. and the Council’s decisions in Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005) and Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005).
3. Although Custodian Conti’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 Custodian Conti provided a written response to the Complainant eight (8) business days following the date of the Complainant’s request informing the Complainant that there were no records relevant to this complaint that were responsive to the Complainant’s request, it is concluded that Custodian Conti’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, Custodian Conti'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 25th Day of February, 2009

Robin Berg Tabakin, Chair
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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**William Osterman¹
Complainant**

GRC Complaint No. 2008-12

v.

**City of Trenton (Mercer)²
Custodian of Records**

Records Relevant to Complaint: Copies of ordinances, resolutions, certifications or other documents pertaining to waiver of residency for Police Director Joseph Santiago.³

Request Made: December 8, 2005

Response Made: December 20, 2005

Custodian: Anthony J. Conti⁴

GRC Complaint Filed: January 15, 2008

Background

December 08, 2005

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 20, 2005

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. The Custodian states, *inter alia*, that there are no ordinances, resolutions, certifications or other documents pertaining to the waiver of residency for Police Director Santiago.⁵

January 15, 2008

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

- Complainant's OPRA request dated December 8, 2005
- Custodian Conti's response to the Complainant's OPRA request dated December 20, 2005

¹ No legal representation listed on record.

² Represented by R. Denise Lyles, Esq., of the City of Trenton Department of Law (Trenton, NJ).

³ The Complainant's OPRA request contained additional items which are not the subject of this complaint.

⁴ Mr. Conti retired from employment with the City of Trenton in March 2007.

⁵ The Custodian also replied to requests for other records which are not relevant to this complaint.

The Complainant states that Custodian Conti responded to his OPRA request claiming that there were no records responsive to the request. The Complainant further states that on January 13, 2008, he discovered on www.southtrenton.com/blog.htm, which he contends is an internet website maintained by Trenton City Councilman James Coston, a copy of an emergency waiver of a residency requirement granted to Director Santiago. The Complainant states that the document, dated November 7, 2005, was issued by Mayor Douglas Palmer to Trenton Business Administrator Jane Feigenbaum.

The Complainant contends that because the record was dated approximately one month prior to his OPRA request it should have been disclosed to him in response to his request. He contends that Custodian Conti's failure to disclose the record constitutes a refusal of the City to furnish public records.

The Complainant did not agree to mediate this complaint.

January 30, 2008

Request for the Statement of Information sent to the Custodian.

February 6, 2008

Letter from the Custodian to the GRC. The Custodian requests a five (5) business day extension of time to complete and remit the Statement of Information to the GRC.

February 7, 2008

Letter from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to complete and remit the Statement of Information.

February 14, 2008

Telephone call from the Custodian to the GRC. The Custodian requests the GRC forward to her another Statement of Information form.

February 14, 2008

E-mail from the GRC to the Custodian. The GRC sends a Statement of Information form to the Custodian and reminds the Custodian that the completed Statement of Information is due this date.

February 15, 2008

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on January 30, 2008 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely upon the information provided by the Complainant.

February 15, 2008

Custodian's Statement of Information ("SOI") attaching Complainant's OPRA request dated December 8, 2005.

The Custodian cannot certify to specifics regarding the search undertaken to satisfy the records request upon which this complaint is based because the Custodian certifies that Custodian Conti, the custodian at the time of the original request, has since retired from employment with the City of Trenton. The present Custodian certifies she had no involvement in this matter at the time of the original request.

With respect to records retention, the Custodian certifies that if there was a resolution responsive to the Complainant's request, the record would not have 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 that resolutions be retained permanently.

The Custodian certifies that it is the position of the City of Trenton that the Complainant was not provided with a government record because Custodian Conti at the time of the request did not have a government record responsive to the Complainant's request. The Custodian further certifies that the Complainant relied upon information contained on a personal blog of Trenton City Councilman James Coston in support of his complaint; therefore the complaint is not based upon any substantive evidence upon which the GRC would be able to render a decision.

February 21, 2008

Telephone call from the GRC to the Custodian. The GRC asks the Custodian if Custodian Conti can be contacted by the GRC in order to provide a certification. The Custodian informs the GRC that Mr. Conti cannot be contacted and that his present whereabouts are unknown.

February 25, 2008

The Complainant's response to the Custodian's SOI with the following attachments:

- Untitled memorandum ("Memorandum") from Mayor Douglas Palmer to Business Administrator Jane Feigenbaum dated November 7, 2005
- Article from *Trentonian.com* titled "Trenton police head Santiago challenged about residence" dated November 3, 2007
- Article from *nj.com* titled "City waived residency for top cop" dated November 6, 2007
- Memorandum titled "Permanent Residency Waiver" from Mayor Douglas Palmer to Business Administrator Jane Feigenbaum dated November 26, 2007
- Article from *Trentonian.com* titled "Council to Santiago: Move here or move on" dated November 28, 2007
- Article from *nj.com* titled "Santiago: I'll leave before moving" dated November 29, 2007
- Verified Complaint in Lieu of Prerogative Writs filed on January 9, 2008 in Forester, et al. v. Palmer, Santiago and the City of Trenton, Superior Court - Law Division, Mercer County (Docket No. unassigned)
- Article from *Trentonian.com* titled "Council makes it official: Police Director must move to Trenton or hit the road" dated January 16, 2008

- Purported City of Trenton Municipal Ordinance § 2-95. Residence requirements; exception; waiver

The Complainant argues that the Memorandum, which he categorizes as “non-descript,” is a waiver of the residency requirement for Police Director Joseph Santiago, which was granted in violation of local law. The Complainant further argues that the City of Trenton illegally withheld disclosure of the Memorandum. In support of his argument, the Complainant references several documents and media articles from November 2007 and January 2008 which he attaches to his response.

January 13, 2009

Facsimile transmission from the GRC to the Custodian. The GRC requests a certification from the Custodian with respect to her knowledge, if any, regarding the authenticity of the Memorandum and whether Custodian Conti would have had access to the Memorandum at the time of the Complainant’s request.

January 15, 2009

Telephone call from the City of Trenton Department of Law to the GRC. Joseph Alacqua, Esq., of the City of Trenton Department of Law, informs the GRC that from the date of Custodian Conti’s retirement to the date the Complainant filed his Denial of Access Complaint, several persons have rotated through the City Clerk position. Accordingly, Mr. Alacqua informs the GRC that the Custodian cannot be expected to certify as to whether Custodian Conti would have had access to the Memorandum at the time of the Complainant’s request. Mr. Alacqua states that he will consult with the Custodian to see what she will be able to provide the GRC in response to its fax dated January 13, 2009.

The GRC asks Mr. Alacqua if he, or anyone else in the Department of Law, may know the whereabouts of Custodian Conti. Mr. Alacqua replies that the whereabouts of Custodian Conti are unknown.

January 23, 2009

Letter from the Custodian to the GRC. The Custodian informs the GRC that she is unable to certify whether Custodian Conti would have had access to the Memorandum. The Custodian does state that the Memorandum is authentic and provides the GRC with a certified true copy.

Analysis

Whether Custodian Conti 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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian...If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“a custodian of a government record shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived....” 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. Accordingly, 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 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).

In the instant complaint, the Complainant asserts that he submitted an OPRA request to Custodian Conti on December 8, 2005. On December 20, 2005, eight (8) business days after receipt of the Complainant's OPRA request, Custodian Conti responded to the Complainant in writing and informed the Complainant that there were no records responsive to the Complainant's request.⁶

Custodian Conti's failure to respond in writing to the Complainant's OPRA request 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, *supra*.

Whether Custodian Conti, notwithstanding his "deemed" denial, otherwise lawfully denied access to the requested records?

The Complainant contends that Custodian Conti unlawfully denied him access to the Memorandum which the Complainant asserts is responsive to his OPRA request because it is one of the "other documents pertaining to waiver of residency for Police Director Joseph Santiago" that was contemplated by, and within the time frame of, his request. The Complainant's response to the Custodian's Statement of Information was almost entirely comprised of argument intended to convince the GRC that the Memorandum was a waiver of residency.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make *identifiable government records* 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Custodian Conti, the custodian at the time of the request, is no longer employed by the City of Trenton and is otherwise unavailable; therefore he cannot provide a certification with respect to the legal reason for denial of access. Accordingly, the GRC must look to the most credible evidence available to determine if Custodian Conti lawfully denied access to the requested records.

The evidence of record reveals that Custodian Conti's response to the Complainant's OPRA request states "there are no ordinances, resolutions, certifications or other documents pertaining to the waiver of residency for Police Director Santiago." This reason for denial of access is also confirmed by the Complainant in his Denial of

⁶This response concerns only the records relevant to this complaint.
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Access Complaint. Further, the present Custodian certified that Custodian Conti did not provide the Complainant with a copy of any ordinances, resolutions, certifications or other documents pertaining to waiver of residency for Police Director Joseph Santiago because Conti did not have a government record responsive to the Complainant's request. Accordingly, it is undisputed that Custodian Conti did not disclose any of the records relevant to this complaint because he could not locate any record responsive to the Complainant's request.

The Council has repeatedly found that when a custodian certifies to a record's non-existence, short of any credible evidence to the contrary, there was not an unlawful denial of access. In Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant requested a copy of phone records that would prove a phone call was made to him by an official from the Department of Education. The Council found that the Custodian certified that the records responsive to the request did not exist; therefore there was no unlawful denial of access. The Council subsequently followed their decision in Pusterhofer when deciding a complaint presenting a similar set of facts in Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005).

Because the evidence of record reveals that Custodian Conti determined no records responsive to the Complainant's OPRA request existed, Custodian Conti did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1, and the Council's decisions in Pusterhofer v. NJ Department of Education, *supra*, and Renna v. County of Union, *supra*.

Whether Custodian Conti'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 Custodian Conti'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 Custodian Conti provided a written response to the Complainant eight (8) business days following the date of the Complainant's request informing the Complainant that there were no records relevant to this complaint that were responsive to the Complainant's request, it is concluded that Custodian Conti'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, Custodian Conti'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. Custodian Conti's failure to respond in writing to the Complainant's OPRA request 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).
2. Because the evidence of record reveals that Custodian Conti determined no records responsive to the Complainant's OPRA request existed, Custodian Conti did not unlawfully deny the Complainant access to the record pursuant to N.J.S.A. 47:1A-1.1. and the Council's decisions in Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005) and Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005).
3. Although Custodian Conti'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 Custodian Conti provided a written response to the Complainant eight (8) business days following the date of the Complainant's request informing the Complainant that there were no records relevant to this complaint that were responsive to the Complainant's request, it is concluded that Custodian Conti'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, Custodian Conti'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

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009