



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

Albert Bruce Pyle
Complainant

Complaint No. 2008-199

v.

Township of Neptune (Monmouth)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 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. Because the Custodian responded timely and in writing to the Complainant’s October 15, 2007 request, granting access to some of the records requested, denying access to others, and providing a specific reason for the denial of access, and later certified to the GRC that he provided all the records responsive to the Complainant’s request and no further records were available, the Custodian has met his burden of proving that all records responsive to the request were provided to the Complainant pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Consequently, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. The Custodian’s failure to respond in writing to the Complainant’s October 22, 2007 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).
3. Because the Custodian has certified that there were no records responsive to the Complainant’s October 22, 2007 OPRA request and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although the Custodian's failure to respond in writing to the Complainant's October 22, 2007 OPRA request resulted in a "deemed" denial, 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 because no records responsive to the Complainant's October 22, 2007 OPRA request exist. However, the Custodian's "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 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Albert Bruce Pyle¹
Complainant**

GRC Complaint No. 2008-199

v.

**Township of Neptune (Monmouth)²
Custodian of Records**

Records Relevant to Complaint:

OPRA request dated October 15, 2007

Copies of reports from the following agencies regarding 1019 Old Corlies Avenue:

1. Fire Marshall;
2. Township Engineer;
3. Board of Adjustment Planner;
4. Monmouth County Planning Board;
5. NJDEP Approvals, where applicable;
6. New Jersey Department of Transportation;
7. Monmouth County Soil Conservation District;
8. Developer's Agreement;
9. Posting and Performance of Inspection fees;
10. Tree removal permit from the Township Conservation Officer.

OPRA request dated October 22, 2007

Any new compliance plans received by the Custodian since his last OPRA request of October 15, 2007.³

Request Made: October 15, 2007, October 22, 2007

Response Made: October 18, 2007, October 22, 2007

Custodian: Richard Cuttrell

GRC Complaint Filed: September 3, 2008⁴

¹ Represented by Ron Gasiorowski, Esq. (Red Bank, NJ).

² Represented by Monica Kowalski, Esq. (Avon-By-The-Sea, NJ).

³ The Complainant verbally identified the records sought

⁴ The GRC received the Denial of Access Complaint on said date.

Background

October 15, 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.

October 18, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested record is granted. The Custodian provides copies of twelve (12) records responsive to Request Items No. 4, 7 and 9 of the Complainant's October 15, 2007 OPRA request. The Custodian also states that no records responsive exist for the remaining request items.

October 22, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant verbally identified the records sought as the records relevant to this complaint and listed above with an official OPRA request form.

October 22, 2007

Custodian's response to the OPRA request. The Custodian indicates that he verbally informed the Complainant that there were no new records responsive to his request on same business day as receipt of such request.

September 3, 2008

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

- Complainant's OPRA request dated October 15, 2007;
- Custodian's response to the Complainant dated October 18, 2007;
- Complainant's OPRA request dated October 22, 2007.

The Complainant states that he submitted an OPRA request on October 15, 2007. The Complainant further states that the Custodian provided copies of the records available and identified those records that were not available. The Complainant also states that on October 22, 2007, he filed an OPRA request for any new compliance plan records the Township of Neptune ("Township") may have received. The Complainant further states that the Custodian provided him with the new records the Township received since the Complainant's October 15, 2007 OPRA request. The Complainant states that he was informed that the Engineer for the Board of Adjustment was the repository for the compliance documents regarding the property in question. The Complainant further states that as of October 30, 2007 he has not received any records responsive to his October 22, 2007 request.

The Complainant does not agree to mediate this complaint.

September 8, 2008

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

September 16, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 15, 2007;
- Custodian’s response to the Complainant dated October 18, 2007;
- Complainant’s OPRA request dated October 22, 2007.

The Custodian certifies that he did not deny the Complainant access to the records requested. The Custodian further certifies that he provided all the records responsive to the Complainant’s October 15, 2007 OPRA request on October 18, 2007.

The Custodian certifies that the Complainant filed another OPRA request on October 22, 2007. The Custodian certifies that although the Complainant’s October 22, 2007 request stated “see attachment” for the records requested, no attachment was provided. The Custodian certifies that at the time, the Complainant verbally informed the Custodian that he sought compliance plans submitted for the property in question. The Custodian certifies that the plans were not in the Township’s possession at the time of the request. The Custodian certifies that he advised the Complainant that the Township did not have any new records responsive to his October 22, 2007 OPRA request since he filed his October 15, 2007 OPRA request.

The Custodian certifies that in the interim, the compliance plans for the property had been sent by the applicant's engineer to the Township Engineer for the Zoning Board of Adjustment on January 31, 2008. The Custodian certifies although these plans were “sent” to the Township, they were not filed for purposes of government review and as such did not fall into the category of discoverable records. The Custodian certifies that the plans were not deemed “filed” because the Applicant did not pay the required escrow fees. The Custodian certifies that he received a letter dated January 31, 2008 from the Complainant’s Counsel referring to an old OPRA request seeking access to a broad range of unspecified records.

The Custodian certifies that he disclosed all of the records which were available at the time of the Complainant’s requests. The Custodian asserts that OPRA requests are not continuous. The Custodian contends that OPRA requests are not “renewed” upon receipt of records and the receipt of records by itself does not trigger the filing or acceptance of said records by the municipality.

The Custodian certifies that the Township did not receive the compliance records sought by the Complainant until February 1, 2008. The Custodian certifies that the compliance records were not deemed “filed” or “reviewable” by the Township until the applicant satisfied the escrow deficiency. The Custodian certifies that the deficiency was cured on June 5, 2008. The Custodian certifies he advised the Complainant’s Counsel that the records would be copied and made available, despite the lack of an OPRA

request. The Custodian certifies that he is willing to make the compliance records available to the Complainant for a copying fee of \$40.00.

September 11, 2009

E-mail from the GRC to the Custodian. The GRC states that the Custodian stated in the SOI that he provided the Complainant with all the records responsive to the Complainant's October 15, 2007 request. The GRC states that the Custodian also stated that the Complainant submitted an OPRA request dated October 22, 2007 which stated "see attachment" but no additional material was attached to the Complainant's request. The GRC requests that the Custodian provide a written certification indicating whether the October 22, 2007 OPRA request included an attachment detailing the records sought.

September 15, 2009

Certification from the Custodian to the GRC. The Custodian certifies that the Complainant filed an OPRA request on October 15, 2007 requesting records set forth on an attachment for the property located at 1019 Old Corlies Avenue. The Custodian further certifies that he provided all records responsive to the OPRA request on October 18, 2007. The Custodian also certifies that on October 22, 2007, four (4) days later, the Complainant again filed an OPRA request that stated "see attachment" for the list of records sought. The Custodian certifies that nothing was attached to that request. (The Custodian certified in the SOI that the Complainant verbally identified the records sought.) The Custodian also certifies that no new records were filed with regard to the subject property in the four (4) days between the October 15, 2007 and the October 22, 2007 OPRA requests.

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 further provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 ...” N.J.S.A. 47:1A-5.g.

OPRA also states 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 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 request dated October 15, 2007

The Complainant submitted his first OPRA request on October 15, 2007. The Custodian responded to the Complainant’s OPRA request on the third (3rd) business day. The Custodian identified and granted access to twelve (12) records responsive to Request Items No. 4, 7, 9 of the Complainant’s October 15, 2007 OPRA request. The Custodian also stated, and later certified, that there were no records responsive to the remaining request items.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Custodian stated in the SOI that one (1) record responsive to the Complainant’s March 2, 2005 OPRA request was provided and that no other records responsive existed. The Complainant contended that he believed more records responsive did, in fact, exist. The GRC requested that the Custodian certify as to whether all records responsive had been provided to the Complainant. The Custodian subsequently certified on August 1, 2005 that the record provided to the Complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met

the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore, there was no unlawful denial of access.” *Id.*

In the instant complaint, the Custodian responded timely and in writing, granting access to some of the records requested, denying access to others, and providing a specific reason for the denial of access. Moreover, the Custodian later certified to the GRC that he provided all the records responsive to the Complainant’s request and no further records were available. The Complainant has acknowledged receiving all the records that were available at the time of his request

Therefore, because the Custodian responded timely and in writing, granting access to some of the records requested, denying access to others, and providing a specific reason for the denial of access, and later certified to the GRC that he provided all the records responsive to the Complainant’s request and no further records were available, the Custodian has met his burden of proving that all records responsive to the request were provided to the Complainant pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Consequently, the Custodian has not unlawfully denied the Complainant access to the records requested.

OPRA request dated October 22, 2007

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 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 Complainant submitted his second OPRA request on October 22, 2007 wherein he stated “see attachment” in the section reserved for describing the record sought but did not attach to his request any description of the record sought. The Complainant stated that he verbally identified the records sought as any new compliance plans received by the Custodian since the Complainant’s OPRA request of October 15, 2007. The Custodian certified in the SOI that the Complainant did in fact verbally identify said records. The Custodian stated that he responded to the Complainant’s request on the same day as receipt, verbally informing the Complainant that no records responsive to his request existed. The Custodian later certified that there were no records

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.

responsive to the Complainant's request for any new compliance plans filed with the agency since the Complainant's last OPRA request of October 15, 2007.

Therefore, the Custodian's failure to respond in writing to the Complainant's October 22, 2007 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).

Nevertheless, 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.

Because the Custodian has certified that there were no records responsive to the Complainant's October 22, 2007 OPRA request and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 respond in writing to the Complainant's October 22, 2007 OPRA request resulted in a "deemed" denial, 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 because no records responsive to the Complainant's October 22, 2007 OPRA request exist. However, the Custodian's "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 responded timely and in writing to the Complainant's October 15, 2007 request, granting access to some of the records requested, denying access to others, and providing a specific reason for the denial of access, and later certified to the GRC that he provided all the records responsive to the Complainant's request and no further records were available, the Custodian has met his burden of proving that all records responsive to the request were provided to the Complainant pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Consequently, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. The Custodian's failure to respond in writing to the Complainant's October 22, 2007 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).
3. Because the Custodian has certified that there were no records responsive to the Complainant's October 22, 2007 OPRA request and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to respond in writing to the Complainant's October 22, 2007 OPRA request resulted in a "deemed" denial, 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 because no records responsive to the Complainant's October 22, 2007 OPRA request exist. However, the Custodian's "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: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009