



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

December 22, 2009 Government Records Council Meeting

Allen Frost
Complainant

Complaint No. 2008-201

v.

North Hudson Regional Fire Rescue (Hudson)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 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 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). Further, because the Custodian failed to immediately grant or deny access to the four (4) requested budgets, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
2. Although the Custodian’s failure to provide a written response to the Complainant’s ten (10) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s request for the four (4) budgets, because Counsel certified in the Statement of Information that he provided access to all records responsive to the Complainant’s requests on September 9, 2008 and the Complainant received said records on September 15, 2008, 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 22nd Day of December, 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: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**Allen Frost¹
Complainant**

GRC Complaint No. 2008-201

v.

**North Hudson Regional Fire Rescue (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of June, 2008 public session meeting minutes.
2. Copy of 2007 end of year statistics for Communications.
3. Copies of all public session meeting minutes for January, 2006 to December, 2006.
4. Copies of all public session meeting minutes for January, 2005 to December, 2005.
5. Copies of all public session meeting minutes for January, 2004 to December, 2004.
6. Copies of all public session meeting minutes for January, 2003 to December, 2003.
7. Copy of the 2006 budget and 2006 audit.
8. Copy of the 2005 budget and 2005 audit.
9. Copy of the 2004 budget and 2004 audit.
10. Copy of the 2003 budget and 2003 audit.

Request Made: August 22, 2008

Response Made: September 9, 2008

Custodian: Jeffrey Welz

GRC Complaint Filed: September 9, 2008³

Background

August 22, 2008

Complainant's ten (10) Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on ten (10) official OPRA request forms.

September 9, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's ten (10) OPRA requests dated August 22, 2008.

¹ No legal representation listed on record.

² Represented by Thomas R. Kobin, Esq., of Chasan, Leyner & Lamparello P.C. (Secaucus, NJ).

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

The Complainant states that he submitted ten (10) individual OPRA requests to the Custodian via facsimile on August 22, 2008. The Complainant states that he went to the North Hudson Regional Fire & Rescue (“NHRFR”) on August 25, 2008 and that an employee acknowledged receipt of the requests and advised that they would call the Complainant once the records were ready for pickup.

The Complainant states that as of September 5, 2008, the eighth (8th) business day after submission of the requests, he had not received a response from either the Custodian or the Custodian’s Counsel.

The Complainant does not agree to mediate this complaint.

September 9, 2008

Custodian Counsel’s response to the OPRA request.⁴ Counsel responds in writing on the eleventh (11th) business day after receipt of the Complainant’s OPRA requests. Counsel states that all records responsive to the Complainant’s ten (10) OPRA requests are ready for pickup on September 15, 2008 because the Complainant⁵ will be away until September 12, 2008.

Counsel requests that the Complainant contact him if any OPRA requests were not included in this response. Counsel notes that in a telephone conversation, the Complainant expressed interest in obtaining copies of all records responsive.

September 9, 2008

E-mail from the Complainant to the Custodian’s Counsel. The Complainant states that he could not open the attached response from Counsel. The Complainant requests that Counsel either embed the response within an e-mail or send the response via facsimile.

September 10, 2008

E-mail from the Custodian’s Counsel to the Complainant. Counsel states that his secretary will send the response via facsimile.⁶

September 11, 2008

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

September 15, 2008

Custodian’s SOI with the following attachments:

- Complainant’s ten (10) OPRA requests dated August 22, 2008.
- Letter from the Custodian’s Counsel to the Complainant dated September 9, 2008.
- E-mail from the Custodian’s Counsel to the Complainant dated September 9, 2008.

⁴The Custodian’s Counsel attached his response letter to an e-mail.

⁵The Complainant verbally notified the Custodian that he would be out of the area until September 15, 2008.

⁶The evidence of record indicates that Counsel’s response was sent to the Complainant via facsimile on September 10, 2008.

- E-mail from the Complainant to the Custodian’s Counsel dated September 9, 2008.
- E-mail from the Custodian’s Counsel to the Complainant dated September 10, 2009.

Counsel states that the NHRFR received ten (10) OPRA requests via facsimile from the Complainant on August 22, 2008. Counsel states that Senior Clerk Typist Ms. Linda DiPaolo (“Ms. DiPaolo”), who handles OPRA requests, was on vacation at the time of receipt of the Complainant’s requests. Counsel states that the Complainant came to the NHRFR on August 25, 2008 and inquired about his requests, which were located at that time and forwarded to Counsel.⁷

Counsel certifies that he responded to the Complainant on September 9, 2008. Counsel certifies that the Complainant received the records responsive to his ten (10) OPRA requests on September 15, 2008 and paid the appropriate copy costs.

Counsel contends that his schedule did not allow him to respond until September 9, 2008. Counsel asserts that he had litigation to prepare for, was out of the office on August 29, 2008 and had multiple meetings which required action in addition to his normal litigation and other commitments. Counsel argues that he did not see an urgency to respond to the Complainant’s requests for several reasons. Counsel asserts that the Complainant waived his right to receive a written response pursuant to N.J.S.A. 47:1A-5.i. because the Complainant noted on his OPRA requests that the Custodian could call when the requested records were ready for pickup. Further, Counsel asserts that the Complainant submitted several additional requests to the NHRFR which are not relevant to the instant complaint and Counsel felt that a single comprehensive response to all requests was more efficient.

Counsel argues that this complaint should be dismissed because the NHRFR has complied with OPRA and produced all records responsive to the Complainant’s numerous requests. Counsel contends that OPRA does not absolve a requestor from acting reasonably and that the Complainant could have contacted the NHRFR if there were any issues regarding the records responsive. Counsel asserts that the NHRFR has exhibited a willingness to cooperate with the Complainant by contacting him via telephone and providing all records responsive even though the NHRFR has very limited personnel resources and is charged with providing fire and rescue services to five (5) municipalities.

Further, Counsel argues that the Complainant waived his right to receive a written response pursuant to N.J.S.A. 47:1A-5.i. because the Complainant noted on his OPRA requests that the Custodian could call when the requested records were ready for pickup. Counsel contends that in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the GRC deliberated on the issue of a waiver of the statutorily mandated time frame set forth in N.J.S.A. 47:1A-5.i. Counsel states that the Custodian in that complaint asserted that the Complainant verbally waived the seven (7) business day

⁷ The OPRA requests attached to the SOI contain two (2) dates: August 22, 2008 (the date the Complainant submitted said requests via facsimile) and August 25, 2008 (the date Counsel states the requests were forwarded to his office via facsimile).

time frame. Counsel states that the Council explained that the statutorily mandated time frame could not be relaxed because the Custodian never received the Complainant's waiver in writing. Counsel states that the GRC held that "[t]he Custodian could have tried to obtain a written agreement from the Complainant in order to extend the time period required to respond." *Id.*

Counsel contends that the GRC's holding is a clear indication that a custodian should honor a requestor's desire to grant a custodian leeway when such desire is put in writing. Counsel argues that the Complainant's written statement to call when the records were ready is a clear expression of the Complainant's desire to waive the Custodian's statutory obligation to respond. Counsel requests that the GRC find that the NHRFR was absolved of responding within statutory obligations of N.J.S.A. 47:1A-5.i.

Additionally, Counsel contends that even if the GRC finds that the Complainant's explicit waiver is an insufficient argument, the actions of the NHRFR do not rise to the level of a knowing and willful violation of OPRA. Counsel contends that according to Deluca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), a knowing and willful violation must meet a certain set of standards:

"[t]he 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; the Custodian must have had some knowledge that his actions were wrongful; the Custodian's actions must have had a positive element of conscious wrongdoing; the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional."

Counsel contends that there is no knowing and willful violation of OPRA in the instant complaint because the Complainant was provided with all records responsive.⁸

Finally, Counsel states that OPRA creates a separate standard for small classes of public agencies, specifically:

"[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person ... in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than \$10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less..." N.J.S.A. 47:1A-5.a.

⁸ Counsel also argues why prevailing party attorney's fees should not be awarded to the Complainant; however, prevailing party attorney's fees is not at issue in the instant complaint.
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Counsel argues that the NHRFR does not meet the asset parameters as an authority having \$10 million or less in assets; however, the NHRFR is not an authority but rather a joint meeting formed under N.J.S.A. 40:48B-1 et seq.⁹ Counsel contends that NHRFR's limited function is to provide fire and rescue services to its member municipalities and does not collect taxes or have a town clerk. Counsel argues that the NHRFR is exactly the type of public agency the Legislature envisioned when creating N.J.S.A. 47:1A-5.a. and the response should be deemed timely.¹⁰

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:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person ... in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than \$10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less...” N.J.S.A. 47:1A-5.a.

OPRA states that:

“*[i]mmmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and*

⁹ The Consolidated Municipal Services Act, N.J.S.A. 40:48B-1 et seq.

¹⁰ The Custodian did not certify to the search undertaken. Additionally, the Custodian did not certify whether any records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also states 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 therefore. If the custodian of a government record *asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*” (Emphasis added.) N.J.S.A. 47:1A- 5.g.

Additionally, 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 ... 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 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.¹¹ 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

¹¹ 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.

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).

Moreover, the four (4) budgets requested in the instant complaint are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant complaint, the NHRFR received the Complainant’s ten (10) OPRA requests on August 22, 2008. Counsel responded in writing to the Complainant on September 9, 2008, eleven (11) business days after receipt of the Complainant’s requests, providing access to the records responsive. Additionally, the Custodian in this complaint failed to immediately respond to the Complainant’s request for four (4) budgets. As in Herron, *supra*, the Custodian had a duty to respond immediately because the Complainant’s request sought an immediate access record, *i.e.*, budgets, pursuant to N.J.S.A. 47:1A- 5.e.

Therefore, the Custodian’s failure to respond in writing to the 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). Further, because the Custodian failed to immediately grant or deny access to the four (4) requested budgets, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.

Additionally, the Custodian’s Counsel argues that Complainant’s note on the bottom of each request form stating that the Custodian could call when the requested records were ready for pickup is a waiver of the statutorily mandated response time. The GRC has in the past recognized a requestor’s waiver of the statutorily mandated time frame. *See Deluca v. City of Ventnor (Atlantic)*, GRC Complaint No. 2008-08 (December 2008)(holding that no violation of the response time occurred because the Complainant definitively waived her right under OPRA based on the complexity of said request). However, the Complainant’s note in the instant complaint does not explicitly waive the statutorily mandated seven (7) business day response time. Such note merely directs the Custodian to contact the Complainant when the records are ready. Therefore, the Custodian still had an obligation to respond in writing as per the requirements of N.J.S.A. 47:1A-5.i.

Finally, Counsel argues that the NHRFR is a clear example of the type of public agency the Legislature had in mind when drafting N.J.S.A. 47:1A-5.a. (providing that

small municipalities of 5,000 people or fewer, board of educations with an enrollment of 500 or fewer and public agencies with assets less than \$10 million may have limited OPRA hours). Counsel requests that the GRC view the NHRFR's response as timely based on Counsel's belief that N.J.S.A. 47:1A-5.a. should apply to the NHRFR in this complaint. However, Counsel admits in the SOI that the NHRFR does not fall within the asset parameters of N.J.S.A. 47:1A-5.a., because the NHRFR serves several municipalities, does not have an official clerk and does not collect taxes.

Contrary to Counsel's assertions, the Legislature was extremely clear as to which types of small public agencies should be granted limited OPRA hours. In fact, the Legislature took the time to set parameters such agencies must meet. Not only does Counsel admit that the NHRFR does not fall within the asset parameters, Counsel never asserted that the NHRFR had publically posted limited OPRA hours prior to the filing of the Complainant's OPRA requests. Therefore, Counsel's argument is without merit.

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 ten (10) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for the four (4) budgets, because Counsel certified in the SOI that he provided access to all records responsive to the Complainant's requests on September 9, 2008 and the Complainant received said records on September 15, 2008, 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. The Custodian's failure to respond in writing to the 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). Further, because the Custodian failed to immediately grant or deny access to the four (4) requested budgets, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
2. Although the Custodian's failure to provide a written response to the Complainant's ten (10) OPRA requests within the statutorily mandated seven (7) business day time frame resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's request for the four (4) budgets, because Counsel certified in the Statement of Information that he provided access to all records responsive to the Complainant's requests on September 9, 2008 and the Complainant received said records on September 15, 2008, 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: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009