



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

September 30, 2009 Government Records Council Meeting

Joseph Evelina
Complainant

Complaint No. 2008-57

v.

City of Garfield (Bergen)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 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 request for an extension of time to comply with the Complainant's OPRA request is invalid pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to make said request in writing within the statutorily mandated seven (7) business days, and failed to provide an anticipated deadline date on which he would provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly 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 in this complaint certified that the requested meeting minutes were not prepared at the time of the Complainant's OPRA request, and because the Custodian is not required to create records in response to a request, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), the Custodian would have borne his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education,



GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.

4. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for correspondence between Garfield City Council members and the Passaic Valley Water Commission and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 7, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Joseph Evelina¹
Complainant**

GRC Complaint No. 2008-57

v.

**City of Garfield (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

1. Closed session minutes from September 2007 to February 2008.
2. Any and all correspondence (e.g. personal e-mail accounts, work e-mail accounts, municipal e-mail accounts, phone messages, letters, etc.) between Garfield City Council members and Passaic Valley Water Commission from September 2007 to March 2008 regarding Joseph Evelina.

Request Made: March 3, 2008

Response Made: March 10, 2008³

Custodian: Andrew J. Pavlica

GRC Complaint Filed: March 24, 2008⁴

Background

March 3, 2008

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.

March 10, 2008

Custodian's response to the OPRA request. The Custodian responds via telephone to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that according to the City Council members, there are no records responsive to item no. 2 of the Complainant's request. However, the Custodian asks the Complainant for an extension of time to continue searching for any records responsive to said request. The Custodian states that he will call the Complainant in a few days.

¹ No legal representation listed on record.

² Represented by Joseph Rotolo, Esq. (Hackensack, NJ).

³ Response was verbal.

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

March 24, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the Complainant’s OPRA request attached. The Complainant states that he submitted his OPRA request on March 3, 2008. The Complainant states that he has not received any written response to his request or any records responsive to his request.

April 3, 2008

Custodian’s subsequent response to the Complainant’s OPRA request. The Custodian responds in writing on the 22nd business day following receipt of the request. The Custodian asserts that he did not deny the Complainant’s OPRA request. The Custodian states that he received the Complainant’s OPRA request on March 3, 2008. The Custodian states that on March 10, 2008, he spoke to the Complainant via telephone to advise that he is still working on fulfilling the request, but that to date, no responsive e-mails were available.

The Custodian also states that he has completed his search for the records responsive to the Complainant’s OPRA request. The Custodian encloses copies of all closed session minutes dated September 1, 2007 through February 29, 2008. The Custodian requests payment of \$11.00. Regarding the Complainant’s request for e-mails, the Custodian states that based on personal discussions with each Council member, no records responsive exist.

April 15, 2008

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

April 21, 2008

Letter of Representation from Custodian’s Counsel. Counsel requests an extension of time to submit the Custodian’s SOI to the GRC.

April 22, 2008

E-mail from GRC to Custodian’s Counsel. The GRC grants the Custodian’s Counsel an extension of time until the close of business on April 29, 2008 to submit the Custodian’s completed SOI.

April 29, 2008

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 3, 2008
- Letter from Custodian to Complainant dated April 3, 2008
- Meeting minutes dated September 11, 2007
- Meeting minutes dated September 25, 2007
- Meeting minutes dated October 9, 2007
- Meeting minutes dated October 23, 2007
- Meeting minutes dated November 7, 2007
- Meeting minutes dated November 27, 2007
- Meeting minutes dated December 11, 2007
- Meeting minutes dated December 18, 2007
- Meeting minutes dated January 8, 2008

- Meeting minutes dated January 22, 2008
- Meeting minutes dated February 13, 2008
- Meeting minutes dated February 27, 2008

The Custodian certifies that he received the Complainant's OPRA request on March 3, 2008. The Custodian certifies that he contacted the Complainant via telephone on March 10, 2008 and advised that the Council members had not located any e-mails responsive to the Complainant's request. The Custodian certifies that during said telephone conversation with the Complainant, he advised the Complainant that he would continue to search for the requested records and would contact the Complainant again in a few days.

The Custodian also certifies that at the time of the Complainant's OPRA request, the requested closed session minutes were being typed. The Custodian certifies that he provided the Complainant with unredacted copies of the requested closed session minutes after he created the last set of minutes on April 3, 2008.

Additionally, the Custodian certifies that his search for the requested records included telephone calls to each Council member on March 4, 2008, in which each Council member stated that they never e-mailed or wrote about Joseph Evelina to the Passaic Valley Water Commission. The Custodian certifies that he also searched the City Clerk's records and located no records responsive. Further, the Custodian certifies that no records responsive have been destroyed.

November 12, 2008

Garfield Mayor's Certification. The Mayor certifies that he does not maintain any records responsive to the Complainant's request for e-mails.

June 26, 2009

Letter from GRC to Custodian. The GRC requests a legal certification from the Custodian indicating whether any of the requested meeting minutes were prepared and approved by the governing body at the time of the Complainant's OPRA request.

July 6, 2009

Custodian's Certification. The Custodian certifies that the following meeting minutes were not prepared or approved by the governing body at the time of the Complainant's OPRA request:

- Meeting minutes dated September 11, 2007
- Meeting minutes dated September 25, 2007
- Meeting minutes dated October 9, 2007
- Meeting minutes dated October 23, 2007
- Meeting minutes dated November 7, 2007
- Meeting minutes dated November 27, 2007
- Meeting minutes dated December 11, 2007
- Meeting minutes dated December 18, 2007
- Meeting minutes dated January 8, 2008
- Meeting minutes dated January 22, 2008

- Meeting minutes dated February 13, 2008
- Meeting minutes dated February 27, 2008

Additionally, the Custodian certifies that during a telephone conversation with the Complainant on March 10, 2008, the Complainant granted the Custodian an extension of time to comply with the request. Further, the Custodian certifies that there are no records responsive to item no. 2 of the Complainant's OPRA request.

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 also 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 further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ... 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.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). Further, N.J.S.A. 47:1A-5.i provides that a custodian shall advise the requestor when a record can be made available.

In this instant complaint, the Custodian certified that he received the Complainant’s OPRA request on March 3, 2008. The Custodian also certified that he contacted the Complainant via telephone on March 10, 2008 and indicated that he had not located any records responsive to item no. 2 of the Complainant’s request. The Custodian certified that he also requested an extension of time to continue to search for records responsive to said request.

The Council has previously ruled on the requirements of a proper request for an extension of time to respond to an OPRA request. Specifically, in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Council held that the Custodian’s request for an extension of time to fulfill the Complainant’s OPRA request was inadequate because the Custodian failed to make said request in writing within the statutorily mandated seven (7) business days and failed to identify a date on which he would provide the requested records to the Complainant.

In this instant complaint, the Custodian made his request for an extension of time within the statutorily mandated seven (7) business days; however, the Custodian’s request was verbal, not in writing. Additionally, the Custodian failed to provide an anticipated

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.

deadline date upon which he would provide the requested records. Instead, the Custodian requested “a few days” more to continue searching for the requested records.

Therefore, the Custodian’s request for an extension of time to comply with the Complainant’s OPRA request is invalid pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, supra, because the Custodian failed to make said request in writing within the statutorily mandated seven (7) business days and failed to provide an anticipated deadline date on which he would provide the requested records to the Complainant.

Additionally, the Custodian certified that he provided the Complainant with a written response to his request on April 3, 2008, the 22nd business day following receipt of said request, in which the Custodian provided the Complainant access to all of the requested closed session meeting minutes and denied access to the records responsive to request item no. 2 on the basis that no such records exist.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or properly 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, supra.

However, the Custodian certified that at the time of the Complainant’s OPRA request, none of the requested meeting minutes were prepared. Pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 537 (March 2005), a Custodian is not required to create records which do not otherwise exist in response to records requests. The Custodian herein could have lawfully denied access to the requested closed session minutes as they did not exist at the time of the request, but instead the Custodian agreed to create documents in response to this OPRA request.

Additionally, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that the Custodian did not unlawfully deny access to he requested record because the Custodian certified that no records responsive existed.

Therefore, because the Custodian in this complaint certified that the requested meeting minutes were not prepared at the time of the Complainant’s OPRA request, and because the Custodian is not required to create records in response to a request, pursuant to MAG, supra, the Custodian would have borne his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Regarding item no. 2 of the Complainant’s request, the Complainant sought access to all correspondence (e.g., personal e-mail accounts, work e-mail accounts, municipal e-mail accounts, phone messages, letters, etc.) between Garfield City Council members and the Passaic Valley Water Commission from September 2007 to March 2008 regarding Joseph Evelina. The Custodian denied access on the basis that no records responsive exist. Further, the Custodian certified in this SOI that there are no records responsive to item no. 2 of the Complainant’s OPRA request.

Therefore, because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for correspondence between Garfield City Council members and the Passaic Valley Water Commission and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra, had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's request for an extension of time to comply with the Complainant's OPRA request is invalid pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to make said request in writing within the statutorily mandated seven (7) business days, and failed to provide an anticipated deadline date on which he would provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly 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 in this complaint certified that the requested meeting minutes were not prepared at the time of the Complainant's OPRA request, and because the Custodian is not required to create records in response to a request, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), the Custodian would have borne his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
4. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request for correspondence between Garfield City Council members and the Passaic Valley Water Commission and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009