



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Sussy Bogen
Complainant

Complaint No. 2009-50

v.

Township of Lyndhurst (Bergen)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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. Ms. Wloch-Rapetti’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).
2. Because Ms. Wloch-Rapetti failed to forward the Complainant’s September 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Wloch-Rapetti has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007); George v. New Jersey Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skylands, GRC Complaint No. 2008-206 (September 2009).
3. Because the Custodian has certified that no audio recording responsive to the Complainant’s September 22, 2008 OPRA request exists, and because the Complainant has provided no credible evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, Ms. Wloch-Rapetti’s initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i.



because she failed to state that no recording responsive existed in her initial response.

4. Although Ms. Wloch-Rapetti violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i., the Custodian has certified that no records responsive to the Complainant's September 22, 2008 OPRA request exist and that the last date upon which records that may have been responsive to the request 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") was on August 19, 2008. Therefore, it is concluded that Ms. Wloch-Rapetti'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.

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 8th Day of April, 2010

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: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Sussy Bogen¹
Complainant**

GRC Complaint No. 2009-50

v.

**Township of Lyndhurst (Bergen)²
Custodian of Records**

Records Relevant to Complaint:

Copy of a CD recording of the meeting of the Lyndhurst Rent Leveling Board held on May 19, 2008.

Request Made: September 22, 2008

Response Made:

Custodian: Helen Polito³

GRC Complaint Filed: February 9, 2009⁴

Background

September 22, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

September 22, 2008

Cheryl Wloch-Rapetti's, Secretary of the Rent Leveling Board, response to the OPRA request. Ms. Wloch-Rapetti responds verbally to the Complainant's OPRA request on the same business day as receipt of such request. Ms. Wloch-Rapetti states that the Complainant may return in a few days to pick up the requested CD.

February 9, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC"), attaching Complainant's OPRA request dated September 22, 2008.⁵

¹ No legal representation listed on record.

² Represented by Gary J. Cucchiara, Esq., Stryker, Tams & Dill, LLC (Newark, NJ).

³ Ms. Polito is the Township Clerk and is the Custodian of Records for the Township of Lyndhurst.

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

⁵ The Complainant attached additional materials which are not relevant to this adjudication of this Denial of Access Complaint.

The Complainant states that in September 2008, she asked Cheryl, the Secretary of the Lyndhurst Rent Leveling Board, if she had visual recordings of the meeting held on May 19, 2008. The Complainant states that Cheryl stated that she did not have a visual recording of the meeting but did have an audio recording of the meeting. The Complainant further states that on September 22, 2008, she completed an OPRA request form for the CD audio recording of the May 19, 2008 meeting of the Rent Leveling Board. The Complainant also states that a week later, she asked Cheryl if the copy of the audio recording was ready. The Complainant states that Cheryl informed her that Cheryl had not yet had a chance to make a copy of the recording. The Complainant further states that she again asked Cheryl about the status of the copy one week later; the Complainant states that Cheryl again stated that she had not yet had a chance to make the copy. The Complainant states that Cheryl then stated that she had misplaced the CD. The Complainant states that a few days later, Cheryl stated that someone might have recorded something over what was recorded at the meeting. Finally, the Complainant states that Cheryl stated that the meeting was never recorded.

The Complainant does not agree to mediate this complaint.

February 10, 2009

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

February 18, 2009

Custodian’s SOI attaching the Complainant’s OPRA request dated September 22, 2008.

The Custodian certifies that the Complainant’s OPRA request was received on September 22, 2008 and responded to on the same day. The Custodian further certifies that the Complainant was told to return to the Custodian’s office in a few days to pick up the requested CD.

The Custodian also certifies that the Complainant returned on September 25, 2008. The Custodian certifies that Cheryl Wloch-Rapetti, the secretary for the Rent Leveling Board, informed the Complainant that the CD would be ready later that afternoon. The Custodian further certifies that when Ms. Wloch-Rapetti listened to the recording, said recording proved to be a recording of a Zoning Board meeting rather than the Rent Leveling Board meeting requested by the Complainant. The Custodian certifies that Ms. Wloch-Rapetti is the secretary for three (3) boards and uses the same recording system for all meetings of these boards. The Custodian further certifies that on the night the Zoning Board was scheduled to meet, Ms. Wloch-Rapetti was not present and a substitute secretary recorded the minutes in her absence. The Custodian certifies that the minutes of the Rent Leveling Board meeting requested by the Complainant were apparently erroneously erased and the minutes of the Zoning Board meeting were taped over such meeting.

The Custodian certifies that Ms. Wloch-Rapetti listened to all recordings from April through December of 2008 of meetings from all three (3) boards for which she is currently the secretary. The Custodian certifies that because the requested recording of May 19, 2008 meeting of the Rent Leveling Board had apparently been erased, Ms.

Wloch-Rapetti provided the Complainant with a written synopsis of the requested meeting in lieu of a tape recording.

The Custodian further certifies that the Township made a significant good-faith attempt to provide all records requested by the Complainant and to explain any failure to produce the requested records.

The Custodian argues that the requested record is not a government record as that term is defined at N.J.S.A. 47:1A-1.1. The Custodian argues that the definition of a “government record” is not as broad as the common law definition of “public records.” Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). The Custodian contends that the Complainant’s request for a “visual record” is unclear and is not the type or format of record covered by N.J.S.A. 47:1A-1 et seq. The Custodian states that the request was not properly submitted to the appropriate officer.

The Custodian further argues that the Township was required to produce the record or provide a denial of the request within seven (7) days of the request. The Custodian states that the Township, through various personnel, attempted to ascertain exactly what information the Custodian was seeking. The Custodian asserts that these acts demonstrate the Township’s good faith. The Custodian further asserts that the Township properly denied the Complainant’s request. The Custodian argues that when a request is complex because it fails to specifically identify the records sought, then that request is not encompassed by OPRA and OPRA’s deadlines do not apply. New Jersey Builders Ass’n v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), *certif. denied* 190 N.J. 394.

The Custodian states that the Township’s failure to provide within seven (7) days either the precise material the Complainant attempted to request or a denial of the request, is attributable to several reasons: first the Township conscientiously attempted to clarify the material requested by the Complainant and, once the Township properly understood the records requested, the record requested had been unintentionally destroyed.

The Custodian asserts that the Township communicated with the Complainant and kept her advised as to the status of the request in full compliance with the spirit and intent of N.J.S.A. 47:1A-5.i. The Custodian claims that because the requested record was physically unavailable for production, the Township offered the Complainant a summary/synopsis of the hearing to which the Complainant’s request related on September 22, 2008. The Custodian contends that the Township did not attempt to withhold records, such as through a prohibitive fee demand. The Custodian asserts that in no way whatsoever can the Township’s response to the Complainant’s OPRA request be deemed in bad faith or a denial of government records or a concealment of information.

The Custodian also certifies that audio recordings may be erased ninety (90) days after the public meeting pursuant to the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”); the last date such records may have been destroyed was August 17, 2008.

December 22, 2009

E-mail from the GRC to the Custodian. The GRC states that the Custodian has indicated that the requested recording does not exist. The GRC requests that the Custodian provide a certification to this effect by the close of business on December 24, 2009.

December 24, 2009

E-mail from the Custodian to the GRC. The Custodian states that the requested recording does not exist.

January 6, 2010

E-mail from the GRC to the Custodian. The GRC requests a certification from the Custodian that the requested record does not exist and provides the appropriate certification format.

January 6, 2010

Letter from the Custodian to the GRC. The Custodian certifies that the recording sought by the Complainant in this matter does not exist. The Custodian further certifies that the employees of the Township have continuously made significant good faith attempts to provide all information requested by the Complainant.

January 21, 2010

Letter from the Custodian to the GRC. The Custodian certifies that the Complainant submitted the OPRA request which is the subject of this complaint in person to Cheryl Wloch-Rapetti, Rent Leveling Board Secretary. The Custodian further certifies that to the best of her recollection, the Custodian became aware of the Complainant's OPRA request on or about December 3, 2008, when she was informed that a Township Commissioner who is also a member of the Rent Leveling Board received a letter from the Complainant on matters relating to the meting in question, but which was not contained in the OPRA request. The Custodian also certifies that, while investigating the items mentioned in this letter, the Custodian was informed of, and was supplied with, a copy of the OPRA request which is the subject of this complaint. Finally, the Custodian certifies that she has no knowledge whether the record requested existed on the date the Complainant submitted her OPRA request.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 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.

The evidence of record in this case indicates that on September 22, 2008, the Complainant personally delivered to Cheryl Wloch-Rapetti an OPRA request seeking a CD audio recording of the Rent Leveling Board’s May 19, 2008 meeting. The evidence of record further indicates that Ms. Wloch-Rapetti responded verbally to the Complainant’s OPRA request.

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.⁶ 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).

Therefore, Ms. Wloch-Rapetti’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).

⁶ 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.

Moreover, OPRA requires “[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.h. Counsel has identified Helen Polito as the Custodian of Record for the Township of Lyndhurst and argued that the Complainant improperly directed the OPRA request to Ms. Wloch-Rapetti even though she is not the official custodian of record. N.J.S.A. 47:1A-5.h. required Ms. Wloch-Rapetti to forward the Complainant’s OPRA request to the proper custodian of record.

Therefore, because Ms. Wloch-Rapetti failed to forward the Complainant’s September 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Wloch-Rapetti has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007); George v. New Jersey Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skylands, GRC Complaint No. 2008-206 (September 2009).

However, the Custodian has certified that the requested record, an audio recording of the Rent Leveling Board’s May 19, 2008 meeting, does not exist. The Custodian has also certified that the last date upon which records that may have been responsive to the request 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”) was on August 19, 2008. The Complainant submitted her OPRA request on September 22, 2008.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no audio recording responsive to the Complainant’s September 22, 2008 OPRA request exists, and because the Complainant has provided no credible evidence to refute the Custodian’s certification in this regard, the Custodian has not unlawfully denied access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, Ms. Wloch-Rapetti’s initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because she failed to state that no recording responsive existed in her initial response.

Whether the Custodian's denial of access to the requested record 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.

In the matter before the Council, the evidence of record indicates that on September 22, 2008, the Complainant personally delivered to Cheryl Wloch-Rapetti an OPRA request seeking a CD audio recording of the Rent Leveling Board's May 19, 2008 meeting. The evidence of record further indicates that Ms. Wloch-Rapetti failed to forward the Complainant's September 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, and responded verbally to the Complainant's OPRA request. The Custodian has certified that the requested record, an audio recording of the Rent Leveling Board's May 19, 2008 meeting, does not exist. The Custodian has also certified that the last date upon which records that may have been responsive to the request 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”) was on August 19, 2008. The Complainant submitted her OPRA request on September 22, 2008.

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 Ms. Wloch-Rapetti violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i., the Custodian has certified that no records responsive to the Complainant's September 22, 2008 OPRA request exist and that the last date upon which records that may have been responsive to the request 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") was on August 19, 2008. Therefore, it is concluded that Ms. Wloch-Rapetti'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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Ms. Wloch-Rapetti'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).
2. Because Ms. Wloch-Rapetti failed to forward the Complainant's September 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Wloch-Rapetti has violated N.J.S.A. 47:1A-5.h. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007); George v. New Jersey Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skylands, GRC Complaint No. 2008-206 (September 2009).
3. Because the Custodian has certified that no audio recording responsive to the Complainant's September 22, 2008 OPRA request exists, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, Ms. Wloch-Rapetti's initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because she failed to state that no recording responsive existed in her initial response.
4. Although Ms. Wloch-Rapetti violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i., the Custodian has certified that no records responsive to the Complainant's September 22, 2008 OPRA request exist and that the last date upon which records that may have been responsive to the request 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") was on August 19, 2008. Therefore, it is concluded that Ms. Wloch-Rapetti'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.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010

DocuCom PDF Trial
www.pdfwizard.com