



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 23, 2009 Government Records Council Meeting

Georgina Shanley
Complainant

Complaint No. 2009-58

v.

City of Wildwood (Cape May)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 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 failed to immediately grant or deny access to the requested invoice responsive to request Item No. 1, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
2. The Custodian failed to respond immediately in writing to the Complainant’s February 4, 2009 OPRA request for the invoice responsive to request Item No. 1, thus violating N.J.S.A. 47:1A-5.e. However, Ms. Pinto responded to the Complainant on February 13, 2009, stating that no records responsive to the Complainant’s request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., he did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s failure to respond immediately to the Complainant’s February 4, 2009, OPRA request for an invoice resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did respond in writing on the sixth (6th) business day following the Complainant’s request stating that no records responsive to the Complainant’s request exist and subsequently certified in the Statement of Information that no records responsive exist. Therefore, 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 violation of N.J.S.A. 47:1A-5.e. 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 23rd Day of June, 2009



Robin Berg Tabakin, Chair
Government Records Council

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



Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 26, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Georgina Shanley¹
Complainant**

GRC Complaint No. 2009-58

v.

**City of Wildwood (Cape May)²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of invoice from supplier to Walter's Marine for purchase of uncertified wood to re-deck Wildwood's boardwalk, including the name of the supplier and date of order.
2. Import documentation for the uncertified wood received by Walter's Marine, including source and importation site.

Request Made: February 4, 2009

Response Made: February 13, 2009

Custodian: Christopher Wood

GRC Complaint Filed: February 25, 2009³

Background

February 4, 2009

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.

February 13, 2009

Ms. Hope Pinto's ("Ms. Pinto"), Principal Clerk Typist/Vital Statistics, response to the OPRA request.⁴ On behalf of the Custodian, Ms. Pinto responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Ms. Pinto states that the City of Wildwood has not made, maintained or kept on file any of the records responsive to the OPRA request, but that the Complainant is welcome to contact Walter's Marine to retrieve the information sought.

¹ No legal representation listed on record.

² Represented by Marcus Karavan, Esq. (Wildwood, NJ).

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

⁴ The Custodian informed the GRC in an e-mail dated April 28, 2009 that Ms. Pinto handles most OPRA requests for the Custodian.

February 25, 2009

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

- Complainant’s OPRA request dated February 4, 2009.
- E-mail from Ms. Hope Pinto (“Ms. Pinto”) to the Complainant dated February 13, 2009.

The Complainant states that she submitted an OPRA request to the Custodian on February 4, 2009. The Complainant states that Ms. Pinto responded in writing on February 13, 2009, stating that the City of Wildwood has not kept, made or maintained any of the records responsive to the request, but that the Complainant is welcome to contact Walter’s Marine to retrieve the information sought.

The Complainant asserts that she cannot believe that the City of Wildwood does not possess any records regarding a project being funded by taxpayer money. The Complainant asserts that she has been directed to submit requests for the information to Walter’s Marine because they are the contractor for the boardwalk project.

The Complainant agreed to mediate this complaint.

April 9, 2009

Offer of Mediation sent to the Custodian.

April 13, 2009

The Custodian did not agree to mediate this complaint.

April 14, 2009

Request for the Statement of Information sent to the Custodian.

April 21, 2009

Custodian’s Statement of Information (“SOI”).

The Custodian certifies that no records responsive to the Complainant’s February 13, 2009, OPRA request are made, maintained or kept on file by the City of Wildwood. The Custodian states that the Complainant is welcome to inspect copies of the bid specifications for the boardwalk project, review bills, change orders and any other information that may be maintained by the City of Wildwood.

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 states that:

“*[i]mmediate* access ordinarily shall be granted to budgets, *bills*, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

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 invoice requested is specifically classified as an “immediate access” record pursuant to N.J.S.A. 47:1A-5.e. In David 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.

The Custodian in this complaint failed to respond immediately to the Complainant’s request Item No. 1 for an invoice regarding the purchase of uncertified wood. As in Herron, supra, the Custodian had a duty to respond immediately because the Complainant’s request was for an immediate access record pursuant to N.J.S.A. 47:1A-5.e. Therefore, because the Custodian failed to immediately grant or deny access to the requested invoice responsive to request Item No. 1, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.

However, Ms. Pinto responded in writing on the sixth (6th) business day after receipt of the request stating that no records responsive to the Complainant's February 4, 2009 OPRA request exist. 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 that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In this complaint, the Custodian failed to respond immediately in writing to the Complainant's February 4, 2009 OPRA request for the invoice responsive to request Item No. 1, thus violating N.J.S.A. 47:1A-5.e. However, Ms. Pinto responded to the Complainant on February 13, 2009, stating that no records responsive to the Complainant's OPRA request exist, the Custodian subsequently certified in the SOI that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., he did not unlawfully deny access to the requested records pursuant to Pusterhofer, supra.

Whether the Custodian's delay in responding to the Complainant's February 4, 2009, OPRA request for an immediate access 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.

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

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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 immediately to the Complainant's February 4, 2009, OPRA request for an invoice resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did respond in writing on the sixth (6th) business day following the Complainant's request stating that no records responsive to the Complainant's request exist and subsequently certified in the SOI that no records responsive exist. Therefore, 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 violation of N.J.S.A. 47:1A-5.e. 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 failed to immediately grant or deny access to the requested invoice responsive to request Item No. 1, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.
2. The Custodian failed to respond immediately in writing to the Complainant's February 4, 2009 OPRA request for the invoice responsive to request Item No. 1, thus violating N.J.S.A. 47:1A-5.e. However, Ms. Pinto responded to the Complainant on February 13, 2009, stating that no records responsive to the Complainant's request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., he did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to respond immediately to the Complainant's February 4, 2009, OPRA request for an invoice resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did respond in writing on the sixth (6th) business day following the Complainant's request stating that no records responsive to the Complainant's request exist and subsequently certified in the Statement of Information that no records responsive exist. Therefore, 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 violation of N.J.S.A.

47:1A-5.e. 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

June 16, 2009