



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Orie J. McMillan
Complainant

Complaint No. 2009-77.5

v.

City of Newark (Essex)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 (January 2010).
2. The Custodian certified on February 16, 2011 that no records responsive to the Complainant’s two (2) OPRA requests exist and the Complainant herein has submitted no credible evidence to refute the Custodian’s certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a “deemed” denial, the Custodian has not unlawfully denied access to the Complainant’s two (2) OPRA requests pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA requests within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian certified on February 16, 2011 that no records responsive to the Complainant’s two (2) OPRA requests exist and there is no credible evidence in the record to refute the Custodian’s certification in this regard, 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. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.



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 29th Day of March, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Orie J. McMillan¹
Complainant**

GRC Complaint No. 2009-77.5

v.

**City of Newark (Essex)²
Custodian of Records**

Records Relevant to Complaint:

February 11, 2009 OPRA request: Copies of minutes taken during all tenants' meetings from January 2008 to February 4, 2009.

February 13, 2009 OPRA request:

1. Copies of minutes taken during all tenants' participation meetings from the beginning of 2007 to February 10, 2009.
2. Copy of a notarized list of signatures for all candidates running for Tenant Association officer positions.
3. Copy of any challenge forms submitted.
4. Copy of the final count of votes for each candidate.

Request Made: February 11, 2009 and February 13, 2009

Response Made: March 16, 2009³

Custodian: Robert Marasco

GRC Complaint Filed: March 4, 2009⁴

Background

February 11, 2009

Complainant's first (1st) 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

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by Danielle Torok, Esq. (Newark, NJ).

³ The Custodian responded in writing to both OPRA requests in one response on March 16, 2009.

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

March 4, 2009

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

- Complainant’s first (1st) OPRA request dated February 11, 2009.
- Complainant’s second (2nd) OPRA request dated February 13, 2009.

The Complainant states that she submitted an OPRA request to the City of Newark Housing Authority (“NHA”) on December 29, 2008. The Complainant states that she received no response from the NHA. Thereafter, Complainant states that she filed two (2) new OPRA requests with the City.

The Complainant agrees to mediate this complaint.

March 16, 2009

Custodian’s response to the OPRA request.⁵ The Custodian responds in writing to the Complainant’s February 11, 2009 OPRA request on the twenty-second (22nd) business day following receipt of such request and the Complainant’s February 13, 2009 OPRA request on the twentieth (20th) business day following receipt of such request. The Custodian states that with respect to the Complainant’s OPRA request for Tenant Association election results, the City of Newark (“City”) does not maintain any records for public housing or privately owned tenants’ associations or their election results.

April 21, 2009

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

May 8, 2009

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

May 22, 2009

Custodian’s incomplete SOI.

January 6, 2010

E-mail from the GRC to the Custodian. The GRC returns the Custodian’s non-compliant SOI and states that the Custodian must promptly correct the deficiencies. Further, the GRC advises the Custodian that the GRC will only return the incomplete SOI once and that if the SOI remains incomplete, the GRC will adjudicate the matter based only on information submitted in the Denial of Access Complaint. The Custodian is informed that the deadline for returning a compliant SOI is January 12, 2010.⁶

⁵ The Custodian’s written response did not indicate whether the Custodian was responding to one (1) or both of the Complainant’s OPRA requests. The Custodian subsequently certified on February 16, 2011 that his March 16, 2009 letter to the Complainant constituted the City’s response to both of the Complainant’s OPRA requests.

⁶ Subsequent to the GRC’s e-mail dated January 6, 2010, the City submitted on an unknown date the Custodian’s written response dated March 16, 2009 and the Complainant’s two (2) OPRA requests.

January 13, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that the above mentioned complaint was originally filed on March 4, 2009. The GRC states that according to the documents submitted as part of the Denial of Access Complaint, the Complainant submitted two (2) OPRA requests dated February 11, 2009 and February 13, 2009 to the City.

The GRC states that it sent a request for an SOI to the City on March 10, 2009. The GRC states that the City submitted an incomplete SOI on May 22, 2009. The GRC states that it subsequently requested on January 6, 2010 that the Custodian resubmit the SOI. The GRC states that it received the following on an unknown date:

- Complainant's February 11, 2009 OPRA request.
- Complainant's February 13, 2009 OPRA request (with notes thereon).⁷
- Letter from the Custodian to the Complainant dated March 16, 2009.

The GRC requests that the Custodian legally certify to the following:

1. Whether any records responsive to the Complainant's February 11, 2009 and February 13, 2009 OPRA requests exist?
2. Whether the Custodian's March 16, 2009 written response to the Complainant represents a response to both OPRA requests?

The GRC requests that the Custodian submit the requested legal certification by close of business on January 21, 2011.

February 14, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that on January 13, 2011, it requested that the Custodian provide a legal certification by close of business on January 21, 2011. The GRC states that it has not received the requested legal certification.

The GRC states that in a brief conversation on February 10, 2011, Counsel advised that she would provide the requested legal certification on February 13, 2011 or February 14, 2011. The GRC requests that Counsel advise as to the status of the legal certification and states that a final deadline to provide same is February 16, 2011.

February 16, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel apologizes for not providing the requested legal certification on February 13, 2011 as she was away from the office unexpectedly. Counsel states that she is working with the Custodian to complete the requested certification.

February 16, 2011

Custodian's legal certification. The Custodian certifies that on or about February 11, 2009 and February 13, 2009, the City received the Complainant's OPRA requests

⁷ The note states that the Complainant was verbally advised on February 13, 2009 that no records responsive existed; however, the note

seeking records relating to tenant association and election results pertaining to the NHA. The Custodian certifies that the City does not possess any records responsive to the Complainant's two (2) OPRA requests because the NHA is an entirely separate entity from the City. The Custodian certifies that based on the foregoing, no records responsive exist.

The Custodian further certifies that the City provided a written response to the Complainant on March 16, 2009 advising that the City did not have any records responsive to the Complainant's (2) OPRA requests. The Custodian certifies that the response letter dated March 16, 2009 constitutes the City's response to both OPRA requests.⁸

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.

Further, 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 ...* In the event a custodian fails to respond within seven business days after receiving a request, *the*

⁸ The Complainant submitted additional correspondence that reiterates the facts of this complaint and GRC Complaint No. 2009-77.

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.⁹ 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 (January 2010).

In this complaint, the Custodian did not respond to the Complainant’s two (2) OPRA requests until the twenty-second (22nd) and twentieth (20th) business day following receipt thereof, respectively, stating that no records responsive exist. The Custodian’s written response was clearly beyond the statutorily mandated time frame set forth under OPRA.

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 (January 2010).

However, 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

⁹ 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.

custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified on February 16, 2011 that no records responsive to the Complainant's two (2) OPRA requests exist and the Complainant herein has submitted no credible evidence to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's two (2) OPRA requests pursuant to Pusterhofer, supra.

Whether the Custodian's untimely response 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 OPRA requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian certified on February 16, 2011 that no records responsive to the Complainant's two (2) OPRA requests exist and there is no credible evidence in the record to refute the Custodian's certification in this regard, 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. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

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 (January 2010).
2. The Custodian certified on February 16, 2011 that no records responsive to the Complainant's two (2) OPRA requests exist and the Complainant herein has submitted no credible evidence to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial, the Custodian has not unlawfully denied access to the Complainant's two (2) OPRA requests pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA requests within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian certified on February 16, 2011 that no records responsive to the Complainant's two (2) OPRA requests exist and there is no credible evidence in the record to refute the Custodian's certification in this regard, 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. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011