



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-06

v.

Township of Belleville (Essex)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 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 December 8, 2009 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 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. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to provide a written response to the Complainant’s request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did provide the Complainant with a copy of all records responsive to the request. 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. 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.

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 24th Day of May, 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: June 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-06

v.

**Township of Belleville (Essex)²
Custodian of Records**

Records Relevant to Complaint:

The Complainant requests copies of the following records:

1. All telephone tape recordings for all taped lines and 911 communication lines for November 10, 2009 from 10:00 a.m. until 11:00 a.m.
2. All radio transmission recordings for all channels for November 10, 2009 from 10:00 a.m. until 11:00 a.m.

Request Made: December 8, 2009

Response Made: None

Custodian: Kelly A. Cavanagh, Clerk

GRC Complaint Filed: January 6, 2010³

Background

December 8, 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.

January 6, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA request dated December 8, 2009.

The Complainant states that he submitted his OPRA requested via facsimile on December 8, 2009. After the expiration of seven (7) business days, the Complainant states that he called the Custodian to check on the status of his request. The Complainant contends that the Custodian stated that the Custodian's Counsel was reviewing the request. The Complainant asserts that thereafter he made several telephone calls to the Custodian's Counsel, but the calls went unreturned and the Complainant states that he subsequently filed this Denial of Access Complaint.

¹ Represented by Walter M. Luers, Esq., Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Thomas Murphy, Esq., (Belleville, NJ).

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

The Complainant does not agree to mediate this complaint.

January 8, 2010

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

January 21, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on January 8, 2010 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

January 22, 2010

The Custodian submits an incomplete SOI to the GRC.

January 25, 2010

Letter from the GRC to the Custodian. The GRC informs the Custodian that she has submitted an incomplete SOI to the GRC. The GRC specifically informs the Custodian that she must complete Item Numbers 8, 9, 10, 11 and 12 of the SOI form. The GRC also informs the Custodian that she must attach a copy of the response to the Complainant’s OPRA request, if any.

January 29, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated December 8, 2009
- Memorandum from the Custodian to the Belleville Chief of Police dated December 15, 2009

The Custodian certifies that her search for the requested records involved preparing a memorandum to Police Chief Joseph Rotonda in which the Custodian requested the Chief forward to her office copies of the records requested by the Complainant. The Custodian also certifies that the date upon which the records responsive to the request could have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management was December 11, 2009.

The Custodian certifies that after receipt of the Complainant’s OPRA request the Custodian wrote a memorandum to the Belleville Police Chief requesting copies of records that the Complainant had requested. The Custodian further certifies that her office had concerns regarding victim information that may have been captured on the radio transmissions and for this reason the deputy clerk contacted the Assistant Township Attorney for assistance. The Custodian states that the Assistant Township Attorney asked to speak with the Complainant in order to obtain more information about the Complainant’s request. The Custodian further states that Counsel’s request for more information was passed onto the Complainant and that the Complainant called Counsel, but Counsel did not return the Complainant’s phone calls.

The Custodian certifies that a diskette containing all of the information responsive to the Complainant's OPRA request was disclosed to the Complainant in unredacted form on January 22, 2010.

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 states that:

"[a] custodian shall promptly comply with a request to inspect, examine, copy or provide a copy of a government record. If 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...[i]f the custodian of a government record asserts that part of a particular record is exempt from public access...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." N.J.S.A. 47:1A-5.g.

OPRA further states that:

"Unless 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 ...* [i]n 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 ...* [t]he 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. 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).

In the instant complaint, the Custodian certified that she received the Complainant’s OPRA request on December 8, 2009. The Custodian further certified that no response was provided to the Complainant regarding his request until the records were disclosed to the Complainant on January 22, 2010.

Accordingly, the Custodian’s failure to respond in writing to the Complainant’s December 8, 2009 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 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).

Because the Custodian disclosed to the Complainant all of the requested records on January 22, 2010, it is not necessary for the GRC to conduct an analysis as to whether the requested records were or were not exempt from disclosure.

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 violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to provide a written response to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did provide the Complainant with a copy of all records responsive to the request. 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. 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.

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 December 8, 2009 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 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. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by failing to provide a written response to the Complainant's request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, the Custodian did provide the Complainant with a copy of all records responsive to the request. 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. 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.

Prepared By: John E. Stewart, Esq.
Mediator

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011