



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Frank Boslet
Complainant

Complaint Nos. 2010-327 & 2010-328

v.

Township of Knowlton (Warren)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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. Although the Custodian responded to the Complainant’s November 24, 2010 OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian’s failure to respond *in writing* to the Complainant’s November 24, 2010 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007) and DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007) (holding that a Custodian’s verbal response, although within the seven (7) business days, was not in writing, thus creating a deemed denial of the complainant’s request).
2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant’s OPRA requests dated November 16, 2010 and November 24, 2010 exist and because there is no evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.
3. 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 to the Complainant’s November 24, 2010 OPRA request, although she responded timely. However, the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the Statement of Information that no records responsive to the Complainant’s OPRA requests dated November 10, 2010 and November 24, 2010 exist and the Complainant submitted no evidence to refute the Custodian’s certification. 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 29th Day of May, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Frank Boslet¹
Complainant**

GRC Complaint No. 2010-327 & 2010-328

v.

**Township of Knowlton (Warren)²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

GRC Complaint No. 2010-327:

Any and all reports or complaints signed against the Complainant.

GRC Complaint No. 2010-328:

Any and all correspondence prior to the issuing of the summonses issued by Zoning Officer, Mr. George Rabtzow (“Mr. Rabtzow”) or on his behalf from January 2008 through the present.

Request Made: November 10, 2010 & November 24, 2010

Response Made: November 16, 2010 & November 24, 2010

Custodian: Lisa Patton

GRC Complaint Filed: December 13, 2010³

Background

November 10, 2010

Complainant’s Open Public Records Act (“OPRA”) request relevant to GRC Complaint No. 2010-327. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 16, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that she forwarded the Complainant’s OPRA request to Mr. Rabtzow. The Custodian also states that Mr. Rabtzow has requested a one (1) week extension of time to research this request. The Custodian further states that she will contact the Complainant on November 23, 2010 with Mr. Rabtzow’s findings.

¹ Represented by Angelo Perucci, Esq. (Washington, NJ).

² Represented by Richard P. Cushing, Esq., of Gebhardt & Keifer Law Offices, P.C. (Clinton, NJ).

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

November 23, 2010

Letter from the Custodian to the Complainant. The Custodian states that Mr. Rabtzow advised the Custodian that all complaints responsive to the Complainant's OPRA request dated November 10, 2010 were anonymous and therefore not signed. The Custodian also states that there are no records responsive to the Complainant's OPRA request dated November 10, 2010.

November 24, 2010

Complainant's OPRA request relevant to GRC Complaint No. 2010-328. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 24, 2010

Custodian's response to the Complainant's OPRA request. The Custodian verbally responds to the Complainant's OPRA request on the same business day as receipt of such request via a telephone conversation. The Custodian requests that the Complainant clarify his OPRA request. The Complainant verifies that he seeks information regarding any zoning complaints regarding his property, which is the same information sought in his OPRA request dated November 10, 2010. The Custodian states that she understands the Complainant's November 24, 2010 OPRA request to be seeking the same information as in his request dated November 10, 2010. The Custodian also states that she will double check with Mr. Rabtzow to see if there are any records responsive when he returns.

December 8, 2010

Complainant visits the Custodian's office. The Custodian verbally informs the Complainant that there are no records responsive to his OPRA requests dated November 10, 2010 and November 24, 2010. The Complainant states that his November 24, 2010 request seeks the same information as he requested on November 10, 2010.

December 13, 2010

Denial of Access Complaints filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated November 10, 2010
- Letter from the Custodian to the Complainant dated November 16, 2010
- Complainant's OPRA request dated November 24, 2010

The Complainant states that the Custodian has not responded to his OPRA requests. The Complainant also states that he added a new fence to his 25 acre property at a cost of \$45,000.00. The Complainant further states that the fence was installed according to code behind an existing fence. The Complainant states that Mr. Rabtzow informed him that the fence was not installed according to code. The Complainant states that he also installed a barn at a cost of \$65,000.00 and constructed the barn where Mr. Rabtzow told him to place it. The Complainant also states that now Mr. Rabtzow asserts that the barn is in the wrong place. The Complainant further states that he hired an

engineer to prove that the fence and barn installations are in compliance with the applicable code.

The Complainant states that Mr. Rabtzow claimed that the Complainant's neighbors informed Mr. Rabtzow that the property was unkempt and the fence was improperly installed. The Complainant states that the neighbors have informed the Complainant that they have not complained about the Complainant's property.

December 14, 2010

Offer of Mediation sent to both parties.

December 17, 2010

The Custodian agrees to mediate this complaint.

December 23, 2010

Letter from the Custodian to the Complainant. The Custodian states that this letter confirms their in-person conversation on December 8, 2010 that no records exist which are responsive to the Complainant's OPRA requests dated November 10, 2010 and November 24, 2010.

January 14, 2011

The Complainant agrees to mediate this complaint.

January 14, 2011

Complaint is referred to mediation.

August 19, 2011

Complaint is referred back to the GRC for adjudication.

August 22, 2011

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

August 29, 2011

E-mail from Custodian's Counsel to the GRC. Counsel requests a one (1) week extension to complete the SOI for GRC Complaint No. 2010-328.

August 30, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel a one (1) week extension to complete the SOI for GRC Complaint No. 2010-328. The GRC requests Counsel to provide the SOI no later than September 6, 2011. The GRC states that there is another Denial of Access Complaint against the Township of Knowlton ("Township") at GRC Complaint No. 2010-327. The GRC inquires if Counsel also needs an extension to complete this SOI as well.

August 30, 2011

E-mail from Custodian's Counsel to the GRC. Counsel requests a one (1) week extension to complete the SOI for GRC Complaint No. 2010-327. Counsel states that

unless she hears from the GRC otherwise, she understands that the GRC will grant the same extension as in GRC Complaint No. 2010-328.

September 6, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 10, 2010
- Letter from the Custodian to the Complainant dated November 16, 2010
- Letter from the Custodian to the Complainant dated November 23, 2010
- Complainant's OPRA request dated November 24, 2010
- Letter from the Custodian to the Complainant dated December 23, 2010

The Custodian certifies that zoning complaints are not listed in the retention schedule. However, the Custodian certifies that the New Jersey Department of State, Division of Archives and Records Management ("DARM") advised the Custodian that zoning complaints are similar to site plans and are kept for seven (7) years in accordance with the Records Destruction Schedule established and approved by DARM.⁴

GRC Complaint No. 2010-327:

The Custodian certifies that she responded to the Complainant's November 10, 2010 OPRA request on November 16, 2010. The Custodian also certifies that she requested a one (1) week extension to research the request because the zoning office is only open once a week. The Custodian further certifies that she sent a letter to the Complainant on November 23, 2010 informing him that there are no records responsive to this OPRA request.

GRC Complaint No. 2010-328:

The Custodian certifies that she clarified the Complainant's November 24, 2010 OPRA request via a telephone conversation with the Complainant on the same business day as receipt of such request. The Custodian also certifies that the Complainant verified that he sought the same records as in his OPRA request dated November 10, 2010. The Custodian further certifies that Mr. Rabtzow was not in the office on November 30, 2010 and his next regularly scheduled office hours were on December 7, 2010. The Custodian certifies that on December 8, 2010 she verbally informed the Complainant that no records exist which are responsive to either of his OPRA requests. The Custodian certifies that the Complainant again indicated that he sought the same information in both OPRA requests. Lastly, the Custodian certifies that on December 23, 2010 at the request of Custodian's Counsel, she sent a letter to the Complainant to memorialize the conversation that occurred on December 8, 2010.

The Custodian certifies that no denial of access to records occurred. The Custodian also certifies that any delay in providing a response to the Complainant was solely due to the limited time schedule of the zoning office. The Custodian also certifies that she checked and double checked that no records exist which are responsive to the

⁴ The Custodian did not certify to the search undertaken to locate the records responsive.

Complainant's OPRA requests dated November 10, 2010 and November 24, 2010. The Custodian further certifies that she advised the Complainant that there were no records responsive to either of his requests dated November 10, 2010 and November 24, 2010 as soon as possible.

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request dated November 24, 2010 relevant to GRC Complaint No. 2010-328?

OPRA 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 failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 (Interim Order October 31, 2007).

In the instant complaint, the Custodian filed the OPRA request relevant to GRC Complaint No. 2010-328 on November 24, 2010. The Custodian verbally responded to the request on the same day as receipt thereof and requested clarification of the request.

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.

The Custodian also stated that she would double check with Mr. Rabtzow when he returned to the office to see if any records responsive to the request exist. The Custodian failed to provide a written response to the Complainant regarding his November 24, 2010 OPRA request.

Although the Custodian responded to the Complainant's November 24, 2010 OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian's failure to respond *in writing* to the Complainant's November 24, 2010 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., Kelley, supra and DeLuca, supra (holding that a Custodian's verbal response, although within the seven (7) business days, was not in writing, thus creating a deemed denial of the complainant's request).

Whether any records which are responsive to the Complainant's requests exist?

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 Custodian certified in the SOI that no records exist which are responsive to either of the Complainant's OPRA requests. The Complainant did not submit any evidence to refute the Custodian's certification in this regard.

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 complainant failed to submit any evidence to refute the custodian's certification. The GRC held that 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 in the matter herein certified in the Statement of Information that no records responsive to the Complainant's OPRA requests dated November 10, 2010 and November 24, 2010 exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Although the no records responsive to the Complainant's OPRA requests exist, the Complainant's requests also appear to be broad and unclear and would require the Custodian to conduct research. However, Council declines to address this issue because the Custodian certified in the Statement of Information that no records responsive to either of these requests exist. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Whether the Custodian's deemed denial of the Complainant's November 24, 2010 OPRA request relevant to GRC Complaint No. 2010-328 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).

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 to the Complainant’s November 24, 2010 OPRA request, although she responded timely. However, the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the Statement of Information that no records responsive to the Complainant’s OPRA requests dated November 10, 2010 and November 24, 2010 exist and the Complainant submitted no evidence to refute the Custodian’s certification. 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. Although the Custodian responded to the Complainant’s November 24, 2010 OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian’s failure to respond *in writing* to the Complainant’s November 24, 2010 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., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007) and DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007) (holding that a Custodian’s verbal response, although within the seven (7) business days, was not in writing, thus creating a deemed denial of the complainant’s request).

2. Because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA requests dated November 16, 2010 and November 24, 2010 exist and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

3. 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 to the Complainant's November 24, 2010 OPRA request, although she responded timely. However, the Custodian did not unlawfully deny the Complainant access to the requested records because she certified in the Statement of Information that no records responsive to the Complainant's OPRA requests dated November 10, 2010 and November 24, 2010 exist and the Complainant submitted no evidence to refute the Custodian's certification. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012