



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

April 25, 2012 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2011-142

v.

Franklin Fire District #2 (Somerset)
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 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. 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 (Interim Order October 31, 2007).
2. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant’s request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian’s certification. As such, the Custodian has not unlawfully denied 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 violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant’s request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian’s certification. As such, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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 25th Day of April, 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: April 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2011-142

v.

**Franklin Fire District #2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Copies of Products Services Agreement and Statement of Work agreements between Commissioners and Network Blade, LLC (including any reasonably construed variation thereof) from January 1, 2005 through March 14, 2011 sent via e-mail or fax.

Request Made: March 14, 2011

Response Made: None

Custodian: William Kleiber

GRC Complaint Filed: April 26, 2011³

Background

March 14, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail and a facsimile referencing OPRA. The Complainant states that his preferred method of delivery is via e-mail or fax.

April 12, 2011

E-mail from Custodian's Counsel to Complainant's Counsel.⁴ The Custodian's Counsel states that he does not believe the Complainant has requested any information regarding Network Blade for any date after February 2011. Counsel states that due to the Complainant's interest in any matter involving Network Blade, Counsel is attaching a copy of the new contract the Fire District has executed with Network Blade. Counsel states that this is the first contract the Board of Fire Commissioners ("Board") has executed with Network Blade.

¹ No legal representation listed on record.

² Represented by Eric M. Perkins, Esq. (Skillman, NJ).

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

⁴ The Complainant is represented by Counsel in other GRC matters, but does not list an attorney of record in this instant matter.

April 26, 2011

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

- Complainant’s OPRA request dated March 14, 2011 sent via e-mail
- Complainant’s OPRA request dated March 14, 2011 sent via facsimile (including transmission verification report)
- Network Blade Products and Services Agreement executed by the Fire District on March 16, 2011
- E-mail from Custodian’s Counsel to Complainant’s Counsel dated April 12, 2011

The Complainant states that he submitted his OPRA request on March 14, 2011 for “Products and Services Agreements” and/or “Statement of Work” agreements between the District and Network Blade, LLC for the period of January 1, 2005 through March 14, 2011. The Complainant states that he submitted his OPRA request via e-mail and facsimile.

The Complainant states that on April 12, 2011 his attorney received an e-mail from the Custodian’s Counsel stating that Custodian’s Counsel does not believe that the Complainant’s request sought records regarding Network Blade after February 2011. Additionally, Custodian’s Counsel attached a copy of the Fire District’s recently executed contract with Network Blade, which Counsel stated is the first formal contract the Fire District executed with said company.

The Complainant states that the District executed the contract on March 16, 2011, two (2) days after he filed his OPRA request. Additionally, the Complainant states that Custodian Counsel’s assertion that the OPRA request does not seek records after February 2011 is completely untrue. The Complainant contends that taking 21 business days to respond to his request, in conjunction with the totality of all the other OPRA requests he has submitted to the District, establishes a pattern of deliberate, intentional and willful conduct in handling his requests. The Complainant states that his request sought records for the period of January 1, 2005 through March 14, 2011.

Further, the Complainant asserts that because the Custodian failed to respond to his OPRA request within the statutorily mandated seven (7) business days, his request is “deemed” denied and the Complainant requests the following from the Council:

1. A finding that the Custodian violated OPRA by failing to respond to the Complainant’s request within the statutorily mandated time frame; and
2. A finding that the Custodian knowingly and willfully violated OPRA.

Additionally, the Complainant does not agree to mediate this complaint.

May 17, 2011

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

May 25, 2011

E-mail from Custodian’s Counsel to GRC. Counsel requests a five (5) business day extension of time to submit the Custodian’s completed SOI.

May 25, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants a five (5) business day extension of time for Counsel to submit the Custodian’s completed SOI.

June 9, 2011

Custodian’s SOI with the Complainant’s Denial of Access Complaint attached. The Custodian certifies that he received the Complainant’s OPRA request on March 14, 2011. The Custodian also certifies that he did not provide the Complainant with any response to his OPRA request.

The Custodian certifies that the date on which any 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 is not applicable because no records responsive to the Complainant’s OPRA request exist.⁵

Additionally, in Counsel’s cover letter under which the Custodian submitted this SOI, Counsel states that the Fire District has no record known as “Product Services Agreement” or “Statement of Work.” Counsel states the Board did adopt by formal resolution an agreement with Network Blade on March 16, 2011, which is two (2) days after the Complainant submitted his OPRA request, and two (2) days after the date range included in the Complainant’s request. Nevertheless, Counsel states that he provided the Complainant with a copy of said agreement after the Board adopted said agreement. Additionally, Counsel states that the Complainant disputes the date on which the Board took said action. However, Counsel states the Board is only permitted to take action at a public meeting pursuant to the Open Public Meetings Act. Counsel states that the Board’s annual list of meetings indicated that the Board has only one monthly meeting on the third Wednesday of each month. Counsel stated that in this case, the third Wednesday was March 16, 2011.

Analysis

Whether the Custodian timely responded to the Complainant’s OPRA request?

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.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive to the Complainant’s request.

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.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 (Interim Order October 31, 2007).

In this instant complaint, the Complainant stated that he submitted his OPRA request via e-mail and fax on March 14, 2011. The Custodian certified in his SOI that he received the Complainant’s OPRA request on March 14, 2011. The Custodian also certified that he did not provide any response to the Complainant’s request.

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, supra.

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:

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.

“... 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 Complainant requested copies of Products Services Agreement and Statement of Work agreements between Commissioners and Network Blade, LLC, (including any reasonably construed variation thereof) from January 1, 2005 through March 14, 2011 sent via e-mail or fax. The Custodian certified in his SOI that no records responsive to the Complainant’s request exist. The Complainant failed to provide any evidence to contradict the Custodian’s certification that no records responsive exist. Additionally, although the Custodian’s Counsel provided the Complainant access to a contract dated March 16, 2011 on April 12, 2011, said contract is not responsive to the Complainant’s OPRA request. This record is not responsive because the time frame for the Complainant’s OPRA request ended March 14, 2011 and the contract provided is dated March 16, 2011, which comes after the end date included in the Complainant’s OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian’s certification. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access.” *Id.*

Therefore, although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant’s request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian’s certification.

As such, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer, *supra*.

Whether the Custodian’s actions rise 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 OPRA at N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant’s request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian’s certification. As such, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer, *supra*. 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 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).
2. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant's request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian's certification. As such, the Custodian has not unlawfully denied 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 violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his request within the statutorily mandated seven (7) business days, the Custodian certified that no records responsive to the Complainant's request exist and the Complainant has failed to provide any competent, credible evidence to refute the Custodian's certification. As such, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). 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: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012