



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2011-329

v.

Township of Livingston (Essex)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, 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). Further, the Custodian’s failure to immediately respond to the Complainant’s request for invoices results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Because the Custodian certified in the Statement of Information that he provided all responsive records as of October 14, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully denied access to the invoices because of his untimely response. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
3. The Custodian’s failure to timely respond to the Complainant’s OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulted in a “deemed” denial and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant’s OPRA request seeking invoices. However, the Custodian certified in the Statement of Information that he provided all responsive records to the Complainant as of September 20, 2011 and the Complainant failed to provide competent, credible evidence refuting same. Additionally, the evidence of record does not indicate that the Custodian’s violations



of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did 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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2011-329

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Electronic copies of invoices and/or billing documentation that supports specific payments for services rendered by Davis Associates for R-09-58 (\$17,500), R-10-121 (Change Order No. 1 \$6,200), R-10-244 (Change Order No. 2 \$5,000) and R11-197-4417 (Change Order No. 3).

Request Made: September 7, 2011

Response Made: September 20, 2011

Custodian: Glenn Turteltaub

GRC Complaint Filed: October 25, 2011³

Background

October 25, 2011

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

- Complainant’s OPRA request dated September 7, 2011.
- Letter from the Complainant to the Custodian dated September 21, 2011 (with attachments).
- Letter from the Complainant to the Custodian dated October 3, 2011 (with attachments).
- Letter from the Complainant to the Custodian dated October 14, 2011.

The Complainant states that he submitted an OPRA request to the Township of Livingston (“Township”) on September 7, 2011. The Complainant states that upon review of the records provided, the Complainant noticed that two (2) of the invoices did not support the expenditure of certain funds. The Complainant states that he sent a letter to the Custodian on September 21, 2011 attaching the invoices and noting that he did not believe his OPRA request had been satisfied. The Complainant states that he reiterated this to the Custodian in an October 3, 2011 letter.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq., of Johnson, Murphy, Hubner (Riverdale, NJ).

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

The Complainant states that he subsequently scheduled an appointment on October 14, 2011 at which he inspected additional records. The Complainant states that following the inspection, the Complainant sent a letter to the Custodian advising that he believed there were missing purchase orders. The Complainant contends that the Custodian failed to provide these missing records.

The Complainant does not agree to mediate this complaint.

November 30, 2011

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated September 7, 2011 with the Custodian's notes thereon dated September 20, 2011.
- E-mail from the Custodian to the Complainant dated September 20, 2011 (with attachments).
- Letter from the Complainant to the Custodian dated November 14, 2011.
- E-mail from the Custodian to the Complainant dated November 30, 2011 (with attachments).

The Custodian certifies that his search for the requested records involved forwarding the Complainant's OPRA request to the Chief Financial Officer ("CFO").

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on September 8, 2011. The Custodian certifies that he responded on September 20, 2011, the eighth (8th) business day after receipt of the Complainant's OPRA request, providing 15 invoices to the Complainant via e-mail. The Custodian certifies that the Complainant received a 16th record on October 14, 2011.

The Custodian certifies that in three (3) letters dated September 21, October 3, and October 14, 2011, the Complainant contended that he believed some records were missing. The Custodian certifies that on November 14, 2011, the Complainant wrote the Custodian stating that he believed the missing invoices were Purchase Order ("PO") 09-00323 and PO 10-04619. The Custodian certifies that he e-mailed the Complainant on November 30, 2011 noting that these POs were already provided; however, the Custodian was providing them again as attachments.

The Custodian certifies that he provided the Complainant with all responsive records. The Custodian contends that the Complainant's assertion that some records were not provided based on his calculations is of no moment to this complaint; just because the Complainant believes this does not mean it is true. The Custodian further asserts that he did not have an obligation to reconcile records or conduct research to determine whether a record is considered "supporting" documentation. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The Custodian again certifies that he provided all responsive records to the Complainant. The Custodian further certifies that the invoice provided to the Complainant on October 14, 2011 came into existence after receipt of the relevant OPRA request; however, the Custodian provided same even though he had no obligation to provide records on an ongoing basis. Blau v. Union County Clerk, GRC Complaint No. 2003-75 (November 2003).

The Custodian further argues that the Complainant's dispute with the content of the records provided is not within the Council's authority to adjudicate. Kwanzaa v. NJ Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(the GRC does not have authority over the content of a record). The Custodian further contends that it is clear that he did not knowingly and willfully violate OPRA.

December 9, 2011

Letter from the Complainant to the GRC. The Complainant asserts that the Custodian's SOI confirms that his written response was not timely.

The Complainant further asserts that in reviewing the document index, the Custodian listed an additional record that was not provided on September 20, 2011: PO 09-05083. The Complainant asserts that the Custodian has failed to provide this record. The Complainant acknowledges that the Custodian certified in the SOI that a PO was provided on October 14, 2011; however, the Complainant asserts that he did not obtain copies of any records on that day as indicated in his October 14, 2011 letter. The Complainant further contends that the Custodian offered no proof that he provided a PO 09-05083 on October 14, 2011, such as a receipt confirming payment for copies. The Complainant notes that PO 09-05083 that the Custodian certified in the SOI came into existence after the submission of the OPRA request proves that something was missing. The Complainant asserts that this acknowledgment came 27 business days after receipt of the OPRA request.

The Complainant further asserts that MAG, *supra*, does not apply to the subject OPRA request because an open-ended search is not necessary. The Complainant asserts that it is clear a record was withheld because the Complainant sought a series of records consecutively numbered: the records provided show that one number was out of sequence. The Complainant notes that in this case, each purchase order showed the amount previously paid, amount paid by that specific PO and balancing remaining. The Complainant contends that upon his review, he determined that he was not provided with all responsive records. The Complainant also asserts that Schuler, *supra*, does not apply because the Custodian was easily able to identify, obtain and provide a substantial number of responsive records.

The Complainant contends that he could have filed a Denial of Access Complaint on September 21, 2011, but instead informed the Custodian that the request remained unsatisfied. The Complainant asserts that the Custodian is experienced in working under OPRA and has knowingly and willfully violated same by failing to respond in a timely manner providing all responsive records. The Complainant contends that the Custodian was given several opportunities to rectify the situation and failed to do so.

December 12, 2011

Letter from the Complainant to the GRC. The Complainant states that he recently filed multiple complaints against the Custodian. The Complainant asserts that all complaints taken as a group show a clear pattern of noncompliance with OPRA. The Complainant contends that although the Custodian is a lawyer by training, has long worked as the Township's custodian of record, and has testified that he is fully knowledgeable as to the requirements of OPRA, the Custodian has frequently violated same.

The Complainant thus requests that the GRC group all 10 complaints together and, under the totality of the circumstances, determine that the Custodian knowingly and willfully violated OPRA.

Analysis

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

OPRA provides that:

“Immediate 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 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 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).⁴ 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).

The Custodian herein responded to the Complainant's OPRA request in writing on the eighth (8th) business day after receipt of said request. Thus, the Custodian's response was untimely and results in a "deemed" denial.

Additionally, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to invoices, among other types of records. N.J.S.A. 47:1A-5(e). In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggest 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 must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The Complainant's OPRA request at issue herein sought "... invoices and/or billing documentation that supports specific payments for services rendered by Davis Associates for R-09-58 (\$17,500), R-10-121 (Change Order No. 1 \$6,200), R-10-244 (Change Order No. 2 \$5,000) and R11-197-4417 (Change Order No. 3)." Invoices are specifically identified in OPRA as immediate access records. N.J.S.A. 47:1A-5(e). See also Burdick v. Township of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, 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. Further, the Custodian's failure to immediately respond to the Complainant's request for invoices results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5(e). See Herron, supra.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

⁴ 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.

“...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 Complainant filed the instant complaint arguing that the Custodian failed to provide him with all responsive records. In the Denial of Access Complaint, the Complainant argued the invoices provided did not support the expenditure of certain funds. In the SOI, the Custodian certified that he provided all responsive records to the Complainant. The Custodian further argued that because the Complainant believed records were missing based on his own calculations was of no material fact to the complaint.

Subsequent to the SOI, the Complainant submitted a letter to the GRC on December 9, 2011 arguing that the evidence supported that the Custodian withheld a responsive record because all records sought were consecutively numbered. The Complainant further argued that each invoice contained the amount previously paid, amount paid by that specific PO and balancing remaining.

The crux of this complaint is whether the Complainant provided competent, credible evidence refuting the Custodian’s SOI certification that he provided the Complainant with all responsive records.

In order for the Complainant to successfully refute the Custodian’s SOI certification, the Complainant had to provide competent, credible evidence sufficient to overcome the Custodian’s certification that all records responsive to the request were provided to the Complainant. In reviewing the two (2) invoices submitted by the

Complainant and the Custodian's document index, it is immediately clear that the responsive invoices were not consecutively numbered save two (2) invoices. Moreover, the two (2) invoices did contain account information, the validity of which the GRC has no authority to adjudicate. See Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). Essentially, these invoices do not amount to competent, credible evidence that the Custodian failed to provide invoices that were in existence at the time of the Complainant's OPRA request.⁵

Therefore, because the Custodian certified in the SOI that he provided all responsive records as of September 20, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully denied access to the invoices because of his untimely response. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

Finally, the Complainant submitted a letter to the GRC on December 12, 2011 requesting that the GRC combine a number of complaints filed against the Custodian and determine that, under the totality of the circumstances, the Custodian knowingly and willfully violated OPRA. The consolidation of complaints is solely at the discretion of GRC. In this instance and upon review of all complaints submitted by the Complainant, same will not be consolidated based on the number of complaints and the complexity of the issues therein.

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).

⁵ The GRC notes that the Custodian certified in the SOI that on October 14, 2011 he provided the Complainant with PO 09-05083 that came into existence after the submission of the OPRA request, which he was not required to do. See Matthews v. Englewood Public Schools, Board of Education (Bergen), GRC Complaint No. 2008-134 (Interim Order dated September 30, 2009). Thus, the GRC need not address this issue.

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's failure to timely respond to the Complainant's OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulted in a "deemed" denial and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request seeking invoices. However, the Custodian certified in the SOI that he provided all responsive records to the Complainant as of September 20, 2011 and the Complainant failed to provide competent, credible evidence refuting same. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did 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 did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, 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). Further, the Custodian's failure to immediately respond to the Complainant's request for invoices results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5(e). See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Because the Custodian certified in the Statement of Information that he provided all responsive records as of October 14, 2011 and because the Complainant provided no competent credible evidence to refute this fact, the Custodian bore his burden of proof that he did not produce all of the responsive records. N.J.S.A. 47:1A-6. However, the Custodian still unlawfully

denied access to the invoices because of his untimely response. N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

3. The Custodian's failure to timely respond to the Complainant's OPRA request within the prescribed deadline pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulted in a "deemed" denial and the Custodian further violated N.J.S.A. 47:1A-5(e) by failing to respond immediately to the Complainant's OPRA request seeking invoices. However, the Custodian certified in the Statement of Information that he provided all responsive records to the Complainant as of September 20, 2011 and the Complainant failed to provide competent, credible evidence refuting same. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions did 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: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013⁶

⁶ This complaint was originally prepared for the Council's January 29, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.