



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Larry A. Kohn
Complainant

Complaint No. 2012-03

v.

Township of Livingston (Essex)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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).
2. The Custodian’s failure to respond immediately to the Complainant’s OPRA request for invoices and a purchase order 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).
3. The Custodian’s written response was insufficient because the Custodian failed to (a) provide a date certain upon which he would respond to the Complainant and (b) specifically state that the requested record did not exist at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. Because the Custodian certified in the Statement of Information that no record responsive to the Complainant’s request item number 1 exists, and because the Complainant did not submit any evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



5. Notwithstanding the Custodian's "deemed denial," because the Custodian certified in the Statement of Information that on January 10, 2012, he provided to the Complainant all of the records responsive to request item number 2, the Custodian did not unlawfully deny the Complainant access to the records responsive to said request.
6. 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 to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, and violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant's OPRA request seeking immediate access records, and insufficiently responded to the Complainant's OPRA request by failing to provide a date certain upon which he would respond to the Complainant and by not stating that a record responsive to the request was nonexistent at the time of the request, the Custodian did not unlawfully deny access to the requested purchase order responsive to request item number 1 because no such record existed at the time of the Complainant's OPRA request. Further, the Custodian did disclose to the Complainant all invoices responsive to request item number 2 as soon as they were located at the Public Works Department. And further, 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 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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

Larry A. Kohn¹
Complainant

GRC Complaint No. 2012-03

v.

Township of Livingston (Essex)²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Purchase Order for Nature's Choice.
2. Any invoices and/or billing submitted by Nature's Choice to the Township seeking payment for services from October 29, 2011 to December 9, 2011.³

Request Made: December 9, 2011

Response Made: December 21, 2011

GRC Complaint Filed: January 9, 2012⁴

Background⁵

The Complainant filed an OPRA request on an official OPRA request form on December 9, 2011, seeking the records listed above. The Custodian responded in writing to the Complainant's request on December 21, 2011, the eighth (8th) business day following receipt of the request, requesting approximately five (5) additional business days to provide any records responsive to request item number 1 and informing the Complainant that the records responsive to request item number 2 have been requested from the Chief Financial Officer ("CFO") and will be provided to the Complainant upon the Custodian's receipt of the records from the CFO.

The Complainant filed the Denial of Access Complaint with the Government Records Council ("GRC") on January 9, 2012, stating that the Custodian responded to his request on December 21, 2011 requesting approximately five (5) additional business days to provide records responsive to request item number 1 and informing him that the records responsive to request item number 2 will be disclosed after the Custodian receives them from the CFO. The

¹ No legal representation listed on record.

² Glenn Turtletaub, Custodian of Records. Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

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

⁵ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complainant stated that nine (9) additional business days have lapsed but he has not received any of the records responsive to request items numbered 1 and 2.

The Custodian filed his Statement of Information (“SOI”) on January 25, 2012. In the SOI, the Custodian certified that he received the Complainant’s OPRA request on December 9, 2011 and responded to the request on December 21, 2011 and January 10, 2012. The Custodian further certified that he informed the Complainant that approximately five (5) additional business days would be required in order to provide records responsive to request item number 1 and request item number 2.⁶ The Custodian certified that no purchase orders existed for request item number 1 on the date of the Complainant’s request because the requested purchase order was dated December 16, 2011. The Custodian further certified that twenty-nine (29) records responsive to request item number 2 were determined to be responsive to the Complainant’s request. The Custodian certified that said records were located at the Township’s Public Works Department on January 9, 2012 and disclosed via e-mail to the Complainant on January 10, 2012. The Custodian also certified that to show “good faith” he disclosed a copy of the purchase order dated December 16, 2011 to the Complainant via the same e-mail correspondence.

Analysis⁷

Timeliness of Response

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).⁸ 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 there is no dispute between the parties that the Complainant’s OPRA request was received by the Custodian on December 9, 2011 and that the Custodian responded to the request on December 21, 2011, which was the eighth (8th) business day following receipt of the request.

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

⁶ The Custodian did not provide a timeframe for request item number 2; rather he stated that the records responsive to said request would be disclosed to the Complainant after he received them from the CFO.

⁷ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

⁸ 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.

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.

Moreover, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to bills and vouchers, 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.

Here, the Complainant’s OPRA request item number 1 sought a purchase order which, being akin to a voucher is an immediate access record. Further, the Complainant’s request item number 2 sought invoices, which are bills, another type of immediate access record. N.J.S.A. 47:1A-5(e). Although the Complainant requested immediate access records, the Custodian did not first respond until the eighth (8th) business day following receipt of the request.

Accordingly, the Custodian’s failure to respond immediately to the Complainant’s OPRA request for invoices and a purchase order results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5(e). See Herron, supra.

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant’s OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian in the written response requested an extension of time but failed to provide a date certain upon which the requested records would be provided. The Council subsequently held that the custodian’s request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

OPRA further provides that if a custodian cannot comply with a request for records, he “shall indicate the specific basis therefore...” N.J.S.A. 47:1A-5(g). In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the custodian responded to the complainant’s OPRA request denying access to the requested record and later certified in the Statement of Information that the Borough did not receive the requested record until after receipt of the complainant’s OPRA request. The Council held that “[the] response was insufficient because [the Custodian] failed to specifically state that the requested record did not exist at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).”

Here, the Custodian responded in writing to the Complainant’s OPRA request stating that approximately five (5) additional business days would be necessary to provide any records

responsive to request item number 1. By giving an “approximate” time, the Custodian failed to provide a date certain on which he would respond to the Complainant regarding request item number 1. Further, the Custodian failed to provide a timeframe for request item number 2. Also, as in Shanker, the Custodian in his response failed to specifically state that the requested record did not exist at the time of the Complainant’s request.

Accordingly, the Custodian’s written response was insufficient because the Custodian failed to (a) provide a date certain upon which he would respond to the Complainant and (b) specifically state that the requested record did not exist at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Hardwick, *supra*, and Shanker, *supra*.

Unlawful Denial of Access

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 record exists for request item number 1 and the Complainant submitted no 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 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.”

Thus, because the Custodian certified in the SOI that no record responsive to the Complainant’s request item number 1 exists, and because the Complainant did not submit any evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record. See Pusterhofer, *supra*.

With respect to request item number 2, the Custodian certified in the SOI that twenty-nine (29) records responsive to request item number 2 were determined to be responsive to the Complainant’s request. The Custodian certified that said records were located at the Township’s Public Works Department on January 9, 2012 and disclosed via e-mail to the Complainant on January 10, 2012.

Therefore, notwithstanding the Custodian’s “deemed denial,” because the Custodian certified in the Statement of Information that on January 10, 2012, he provided to the

Complainant all of the records responsive to request item number 2, the Custodian did not unlawfully deny the Complainant access to the records responsive to said request.

Knowing & Willful

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 respond in writing to the Complainant’s request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, and violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant’s OPRA request seeking immediate access records, and insufficiently responded to the Complainant’s OPRA request by failing to provide a date certain upon which he would respond to the Complainant and by not stating that a record responsive to the request was nonexistent at the time of the request, the Custodian did not unlawfully deny access to the requested purchase order responsive to request item number 1 because no such record existed at the time of the Complainant’s OPRA request. Further, the Custodian did disclose to the Complainant all invoices responsive to request item number 2 as soon as they were located at the Public Works Department. And further, 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 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).
2. The Custodian's failure to respond immediately to the Complainant's OPRA request for invoices and a purchase order 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).
3. The Custodian's written response was insufficient because the Custodian failed to (a) provide a date certain upon which he would respond to the Complainant and (b) specifically state that the requested record did not exist at the time of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) and Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009).
4. Because the Custodian certified in the Statement of Information that no record responsive to the Complainant's request item number 1 exists, and because the Complainant did not submit any evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Notwithstanding the Custodian's "deemed denial," because the Custodian certified in the Statement of Information that on January 10, 2012, he provided to the Complainant all of the records responsive to request item number 2, the Custodian did not unlawfully deny the Complainant access to the records responsive to said request.
6. 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 to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, and violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to the Complainant's OPRA request seeking

immediate access records, and insufficiently responded to the Complainant's OPRA request by failing to provide a date certain upon which he would respond to the Complainant and by not stating that a record responsive to the request was nonexistent at the time of the request, the Custodian did not unlawfully deny access to the requested purchase order responsive to request item number 1 because no such record existed at the time of the Complainant's OPRA request. Further, the Custodian did disclose to the Complainant all invoices responsive to request item number 2 as soon as they were located at the Public Works Department. And further, 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 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: John E. Stewart, Esq.

Approved By: Brandon Minde, Esq.
Executive Director

April 23, 2013