



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

May 28, 2013 Government Records Council Meeting

Paul Marinaccio
Complainant

Complaint No. 2012-180

v.

Borough of Fanwood (Union)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 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 timely respond 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, Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant’s March 19, 2012 OPRA request in a timely manner. However, the Council declines to order disclosure of the requested records because despite a “deemed” denial of the Complainant’s OPRA request, the Custodian did disclose the records to the Complainant on June 20, 2012.
3. Although 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 resulted in a “deemed” denial of the Complainant’s request, the Custodian did disclose the records responsive to the Complainant’s request on June 20, 2012, once she realized no action had been taken on the request. Therefore, 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 28th Day of May, 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: June 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Paul Marinaccio¹
Complainant**

GRC Complaint No. 2012-180

v.

**Borough of Fanwood (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Police daily duty logs for all officers, supervisors and civilians on January 17, 2009 between 5:00 p.m. and 6:15 p.m., with details regarding surveillance techniques and staffing levels redacted.
2. Computer-aided dispatching (“CAD”) summary report or similar report for all police activities on January 17, 2009 between 5:00 p.m. and 6:15 p.m.

Request Made: March 19, 2012

Response Made: No response made.

GRC Complaint Filed: June 15, 2012³

Background⁴

Request and Response:

On March 19, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above listed records via e-mail. No response was provided.

Denial of Access Complaint:

On June 15, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on March 19, 2012, he submitted an OPRA request to the Custodian seeking the records relevant to this complaint. The Complainant states that the Custodian did not respond to his request.

¹ No legal representation listed on record.

² Eleanor McGovern, Custodian of Records. Represented by Dennis Estis, Esq., of Greenbaum, Rowe, Smith & Davis, LLP (Woodbridge, NJ); however, there are no submissions from the Custodian’s Counsel to the GRC on file.

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

⁴ 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.

Statement of Information:

On June 20, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on March 21, 2012. The Complainant also certifies that the request “fell through the cracks” and she did not respond to it. The Complainant further certifies that on June 20, 2012, she reviewed her e-mails and found the Complainant’s OPRA request, and that she is forwarding the records the Complainant requested to the Complainant together with a copy of the SOI. The Custodian certifies that her failure to respond to the Complainant’s OPRA request was not deliberate.

Additional Information:

On September 4, 2012, the Complainant e-mailed the GRC asserting that on June 20, 2012, he received the records responsive to his March 19, 2012 OPRA request.

Analysis⁵

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* 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).

Here, the Custodian failed to respond in writing in a timely manner to the Complainant’s March 19, 2012 OPRA request. The Custodian certified that the request “fell through the cracks” and therefore she did not respond to it. The Custodian certified that she located the request within her e-mails on June 20, 2012, and disclosed the requested records to the Complainant at that time, which was the sixty-fifth (65th) business day following receipt of the request.

Accordingly, the Custodian admittedly did not timely respond 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.

⁵ 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.

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.

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. OPRA specifically provides however that “...an individual’s name, title, position, salary, payroll record, [and] length of service...shall be a government record...” N.J.S.A. 47:1A-10. 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 admits that she failed to respond to the Complainant’s OPRA request because it “fell through the cracks.” The Custodian certified that upon locating Complainant’s request on June 20, 2012, she immediately disclosed the requested records to the Complainant. On September 4, 2012, the Complainant notified the GRC dated confirmed that the Custodian disclosed the requested records to him on June 20, 2012.

The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant’s March 19, 2012 OPRA request in a timely manner. However, it is unnecessary for the Council to order disclosure of the requested records because despite a “deemed” denial of the Complainant’s OPRA request, the Custodian did disclose the records to the Complainant on June 20, 2012.

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'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 resulted in a "deemed" denial of the Complainant's request, the Custodian did disclose the records responsive to the Complainant's request on June 20, 2012, once she realized no action had been taken on the request. Therefore, 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 did not timely respond 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, Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian unlawfully denied access to the requested records by failing to respond to the Complainant's March 19, 2012 OPRA request in a timely manner. However, the Council declines to order disclosure of the requested records because despite a "deemed" denial of the Complainant's OPRA request, the Custodian did disclose the records to the Complainant on June 20, 2012.
3. Although 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 resulted in a "deemed" denial of the Complainant's request, the Custodian did disclose the records responsive to the Complainant's request on June 20, 2012, once she realized no action had been taken on the request. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013