



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

November 19, 2013 Government Records Council Meeting

Peter J. DeRobertis
Complainant

Complaint No. 2012-199

v.

Township of Montclair (Essex)
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 Supplemental 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 complied with the Council’s October 29, 2013 Interim Order because, although no “actual invoices” existed, she responded within the prescribed time frame certifying to same via certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant’s OPRA request, the Custodian complied with the Council’s June 25 and October 29, 2013 Interim Orders. 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, 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 19th Day of November, 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: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Peter J. DeRobertis¹
Complainant**

GRC Complaint No. 2012-199

v.

**Township of Montclair (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic via e-mail or hardcopy via pickup of all invoices for Roach's Towing and Sam's Garage through May 31, 2012 as provided for in Township Ordinance §322-17.

Custodian of Record: Linda Wanat

Request Received by Custodian: June 4, 2012

Response Made by Custodian: June 28, 2012

GRC Complaint Received: July 2, 2012

Background

October 29, 2013 Council Meeting:

At its October 29, 2013 public meeting, the Council considered the October 22, 2013 Supplemental 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, found that:

1. The Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on fraud. However, the Complainant established that there was a mistake because the Council did not know that the Complainant took issue with the Township's compliance. The Council's July 23, 2013 Interim Order was thus based on an incorrect basis and the Complainant has raised a viable issue that the records provided as part of compliance were not the records ordered to be disclosed. Thus, the Complainant's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast*

¹ No legal representation listed on record.

² Represented by Joseph C. Angelo, Esq. (Montclair, NJ).

Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should re-issue its Order requiring the Custodian to disclose to the Complainant the actual invoices identified in the monthly reports. As was indicated in the Council's June 25, 2013 Interim Order, these are government records subject to disclosure and "... must be disclosed." The detailed towing reports, even with additional information, are insufficient substitutes for the actual invoices if that is what the Complainant is seeking.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. Regarding conclusion No. 2 of the July 23, 2013 Order, the Council should rescind same and amend as follows: "[t]he Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order."

Procedural History:

On October 30, 2013, the Council distributed its Interim Order to all parties. On November 6, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that as part of the Township's compliance to the Council's June 25, 2013 Order, counsel for Roach's and Sam's Towing advised that no invoices from the time period identified by the Complainant existed. The Custodian certifies that upon receipt of the Council's October 29, 2013 Order, she forwarded same to counsel seeking any additional responsive records but received no response.

The Custodian certifies that the Township has provided every record in its possession and those in the possession of Roach's and Sam's Towing. The Custodian certifies that none of these entities maintain actual invoices and therefore same cannot be provided to the Complainant. The Custodian asserts that she cannot provide records that do not exist.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Analysis

Compliance

On October 29, 2013, the Council reconsidered its July 23, 2013 Interim Order and ordered the Custodian to disclose the “actual invoices” to the Complainant and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 30, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.

On November 6, 2013, within the prescribed time frame to respond, the Custodian responded providing certified confirmation of compliance that neither the Township nor Roach’s and Sam’s Towing maintained any actual invoices for the time period identified in the Complainant’s OPRA request. This certification differs from the Custodian’s previous certified confirmation of compliance, which did not definitively state that no actual invoices existed.⁵ Further, although the inclusion of invoice numbers on the detailed towing reports raises some questions about the existence of actual invoices, the GRC relies on the certified statements provided by the Custodian in the absence of any material evidence proving their existence.

Therefore, the Custodian complied with the Council’s October 29, 2013 Interim Order because, although no “actual invoices” existed, she responded within the prescribed time frame certifying to same via certified confirmation of compliance to the Executive Director.

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 “... [i]f 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

⁵ In determining that the Custodian complied with the Council’s June 25, 2013 Order, the Council noted that “... although the Township did not receive the separate invoices from counsel for Roach’s Towing and Sam’s Garage, the records provided appear to contain all of the same information as the invoices.”

forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to records responsive to the Complainant's OPRA request, the Custodian complied with the Council's June 25 and October 29, 2013 Interim Orders. 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, 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 complied with the Council's October 29, 2013 Interim Order because, although no "actual invoices" existed, she responded within the prescribed time frame certifying to same via certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant's OPRA request, the Custodian complied with the Council's June 25 and October 29, 2013 Interim Orders. 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, 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: Frank F. Caruso
Senior Case Manager

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

November 12, 2013



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

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Peter J. DeRobertis
Complainant

Complaint No. 2012-199

v.

Township of Montclair (Essex)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council ("Council") considered the October 22, 2013 Supplemental 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 Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on fraud. However, the Complainant established that there was a mistake because the Council did not know that the Complainant took issue with the Township's compliance. The Council's July 23, 2013 Interim Order was thus based on an incorrect basis and the Complainant has raised a viable issue that the records provided as part of compliance were not the records ordered to be disclosed. Thus, the Complainant's request for reconsideration should be granted. Cummings, 295 N.J. Super. at 384; D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should re-issue its Order requiring the Custodian to disclose to the Complainant the actual invoices identified in the monthly reports. As was indicated in the Council's June 25, 2013 Interim Order, these are government records subject to disclosure and "... must be disclosed." The detailed towing reports, even with additional information, are insufficient substitutes for the actual invoices if that is what the Complainant is seeking.



3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
4. Regarding conclusion No. 2 of the July 23, 2013 Order, the Council should rescind same and amend as follows: "[t]he Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order."

Interim Order Rendered by the
Government Records Council
On The 29th Day of October, 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: October 30, 2013

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting

Peter J. DeRobertis¹
Complainant

GRC Complaint No. 2012-199

v.

Township of Montclair (Essex)²
Custodial Agency

Records Relevant to Complaint: Electronic via e-mail or hardcopy via pickup of all invoices for Roach's Towing and Sam's Garage through May 31, 2012 as provided for in Township Ordinance §322-17.

Custodian of Record: Linda Wanat
Request Received by Custodian: June 4, 2012
Response Made by Custodian: June 28, 2012
GRC Complaint Received: July 2, 2012

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Supplemental 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, found that:

1. The Custodian, via Ms. Lee, has complied with the Council's June 25, 2013 Interim Order because she provided the Complainant with responsive records equivalent to individual invoices and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant's OPRA request, the Custodian complied with the Council's June 25, 2013 Interim Order. 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, the Custodian's actions do not rise to the

¹ No legal representation listed on record.

² Represented by Joseph C. Angelo, Esq. (Montclair, NJ).

level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Procedural History:

On July 26, 2013, the Council distributed its Final Decision to all parties. On August 2, 2013, the Complainant filed a request for reconsideration of the Council's July 23, 2013 Final Decision based on a mistake and fraud. The Complainant contends that the Township of Montclair ("Township") should be required to provide the actual individual invoices for each tow contained in the monthly reports. The Complainant contends that he wants to see towing locations, reasons for towing, date of tow and itemized charges that are not present on the spreadsheets provided, but presumably would be indicated on the individual invoices.

On September 4, 2013, the GRC sent a copy of the filing to Custodian's Counsel in the instance he was not copied on same. On September 5, 2013, the Custodian's Counsel advised that he was not copied on the filing and submitted objections to the request for reconsideration. Counsel contends that the Complainant failed to set forth any argument warranting reconsideration of this complaint.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's July 23, 2013 Order on August 2, 2013, five (5) business days from the issuance of the Council's Order.

Applicable case law holds that:

A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable

whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Originally, the Council’s June 25, 2013 Interim Order required disclosure of the actual invoices identified in the monthly detailed towing reports. In response to the Order, the Township provided new detailed monthly reports obtained from the towing companies with additional information not present in the original reports provided to the Complainant. The Complainant did not contact the GRC to take issue with these records until after the Council’s July 23, 2013 Final Decision; thus, the Council was under the incorrect impression that the Complainant was satisfied with the updated records provided.

The Council’s June 25, 2013 Interim Order held that “... regardless of whether the responsive invoices are in the possession of the towing companies, these invoices are government records, clearly identified in the monthly reports, that must be disclosed.” (*citing Meyers v. Borough of Fair Lawn*, GRC Complaint No. 2005-127 (December 2005); *Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010)). A recent Council holding further reinforced a custodian’s obligation to obtain records created for a public agency and maintained by a third party vendor for that agency. *Paff v. City of Bayonne (Hudson)*, GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013). Thus, although the Council reasonably believed that the Complainant’s OPRA request had been satisfied by the records provided to the Complainant, ultimately, the Custodian failed to release the actual invoices as originally ordered by the Council. Thus, the responsive records were not provided and the Council should reconsider its decision that the updated monthly reports were sufficient.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on fraud. However, the Complainant established that there was a mistake because the Council did not know that the Complainant took issue with the Township’s compliance. The Council’s July 23, 2013 Interim Order was thus based on an incorrect basis and the Complainant has raised a viable issue that the records provided as part of compliance were not the records ordered to be disclosed. Thus, the Complainant’s request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D’Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

The Council should re-issue its Order requiring the Custodian to disclose to the Complainant the actual invoices identified in the monthly reports. As was indicated in the Council’s June 25, 2013 Interim Order, these are government records subject to disclosure and “... must be disclosed.” The detailed towing reports, even with additional information, are insufficient substitutes for the actual invoices if that is what the Complainant is seeking.

Regarding conclusion No. 2 of the July 23, 2013 Order, the Council should rescind same and amend as follows: “[t]he Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.”

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. The Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996). The Complainant failed to establish that the complaint should be reconsidered based on fraud. However, the Complainant established that there was a mistake because the Council did not know that the Complainant took issue with the Township’s compliance. The Council’s July 23, 2013 Interim Order was thus based on an incorrect basis and the Complainant has raised a viable issue that the records provided as part of compliance were not the records ordered to be disclosed. Thus, the Complainant’s request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should re-issue its Order requiring the Custodian to disclose to the Complainant the actual invoices identified in the monthly reports. As was indicated in the Council’s June 25, 2013 Interim Order, these are government records subject to disclosure and “... must be disclosed.” The detailed towing reports, even with additional information, are insufficient substitutes for the actual invoices if that is what the Complainant is seeking.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. Regarding conclusion No. 2 of the July 23, 2013 Order, the Council should rescind same and amend as follows: “[t]he Council defers analysis of whether the Custodian knowingly

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order."

Prepared By: Frank F. Caruso
Senior Case Manager

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

October 22, 2013



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

July 23, 2013 Government Records Council Meeting

Peter J. DeRobertis
Complainant

Complaint No. 2012-199

v.

Township of Montclair (Essex)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental 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, via Ms. Lee, has complied with the Council’s June 25, 2013 Interim Order because she provided the Complainant with responsive records equivalent to individual invoices and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant’s OPRA request, the Custodian complied with the Council’s June 25, 2013 Interim Order. 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, 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 23rd Day of July 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: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Peter J. DeRobertis¹
Complainant**

GRC Complaint No. 2012-199

v.

**Township of Montclair (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic via e-mail or hardcopy via pickup of all invoices for Roach's Towing and Sam's Garage through May 31, 2012 as provided for in Township Ordinance §322-17.

Custodian of Record: Linda Wanat

Request Received by Custodian: June 4, 2012

Response Made by Custodian: June 28, 2012

GRC Complaint Received: July 2, 2012

Background

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Council considered the June 18, 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, found that:

1. The Custodian failed to bear her burden of proving a lawful denial of access to the responsive invoices on the basis that the Township was not in possession of any records. N.J.S.A. 47:1A-6; Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). *See also* Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain and provide the responsive invoices to the Complainant. Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Thus, the Custodian shall obtain and disclose to the Complainant the responsive invoices.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions,**

¹ No legal representation listed on record.

² Represented by Joseph C. Angelo, Esq. (Montclair, NJ).

including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 26, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On July 3, 2013, Juliet Lee, Deputy Clerk, responded to the Council's Interim Order.⁵ Ms. Lee certifies that the Custodian's Counsel forwarded the Council's Order to counsel for Roach's Towing and Sam's Garage to obtain the responsive records. Counsel received two (2) letters attaching records and two (2) letters explaining that the garages tow for the Township of Montclair ("Township") every other month. Ms. Lee certifies that the Township has no access to any other records and has thus complied with the Council's Order.

Analysis

Compliance

On June 25, 2013, the Council ordered the Custodian to disclose responsive invoices to the Complainant and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On June 26, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On July 3, 2013, within the prescribed time frame to respond, Ms. Lee responded simultaneously providing the Complainant and GRC with records and certified confirmation of compliance.

The Township provided the Complainant with copies of monthly detailed tow reports similar to those initially provided; however, these versions of the reports included invoice prices whereas the original records did not. Ultimately, although the Township did not receive the separate invoices from counsel for Roach's Towing and Sam's Garage, the records provided appear to contain all of the same information as the invoices. Thus, the detailed reports inclusive of the additional information are a suitable alternative as responsive records.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ Ms. Lee advised the GRC that the Custodian was on vacation.

Therefore, the Custodian, via Ms. Lee, has complied with the Council's June 25, 2013 Interim Order because she provided the Complainant with responsive records equivalent to individual invoices and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

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 “... [i]f 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 unlawfully denied access to records responsive to the Complainant's OPRA request, the Custodian complied with the Council's June 25, 2013 Interim Order. 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, 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, via Ms. Lee, has complied with the Council's June 25, 2013 Interim Order because she provided the Complainant with responsive records equivalent to individual invoices and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

2. Although the Custodian unlawfully denied access to records responsive to the Complainant's OPRA request, the Custodian complied with the Council's June 25, 2013 Interim Order. 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, 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: Frank F. Caruso
Senior Case Manager

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

July 16, 2013