



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Larry Kohn
Complainant

Complaint No. 2013-117

v.

Township of Livingston (Essex)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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. Rockaway Twp., GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian’s “deemed denial,” he responded to the Complainant’s OPRA request on May 10, 2013, by stating that there were no responsive documents for Item No. 1, and by producing responsive documents for Item No. 2. Because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, it is unnecessary for the Council to order disclosure of the responsive documents for Item No. 2, because the Custodian produced the records to the Complainant.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant’s OPRA request on May 10, 2013, stating that there were no responsive documents for requested Item No. 1, but produced responsive records for Item No. 2. 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 an 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 January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

Larry Kohn¹
Complainant

GRC Complaint No. 2013-117

v.

Township of Livingston (Essex)²
Custodial Agency

Records Relevant to Complaint: copies of:

1. Vendor Report – Alliance Construction Consultants (“Alliance”) from Great Neck, NY. Per their 10/7/11 correspondence/proposal to Lawless to provide expertise in library litigation (request resubmitted per request 3/29/13 – Renee Resky).
2. Correspondence John Casey of Wolff & Samson to Christinsen 3/26/07 & 5/4/07 (see bottom p.3 & p/4 of introduction to 3” notebook – Claim Submission of Integrated Construction for Ruth L. Rockwood Library).

Custodian of Record: Glenn R. Turtletaub

Request Received by Custodian: April 2, 2013

Response Made by Custodian: May 10, 2013

GRC Complaint Received: April 24, 2013

Background³

Request and Response:

On April 2, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 10, 2013, twenty-eight (28) business days later, the Custodian responded in writing that they did not have any responsive documents to requested Item No. 1 referencing Alliance. The Custodian produced a document he believed the Complainant was seeking which referenced a different vendor. For Item No. 2, the Complainant acknowledged the delay in producing the documents and attached same to their response.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner of Murphy, McKeon, PC (Riverdale, NJ) (“Township Attorney”).

³ 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.

Denial of Access Complaint:

On April 24, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he submitted the OPRA request on April 1, 2013⁴, and has not received a response from the Custodian.

Statement of Information:

On May 13, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that upon receipt of the OPRA request, the Custodian’s assistant contacted members of other departments to search for any responsive documents. The Custodian does not certify that he estimated a response time, or sought an extension of time to respond. The Custodian certifies the delay was a result of her assistant having been on vacation, as well as a personal matter. Finally, the Custodian certifies that he responded to the Complainant on May 10, 2013 attaching the documents. The Custodian included the responsive records with his SOI.

Regarding requested Item No. 1, the Township Manager, advised the Custodian’s assistant that the Township of Livingston (“Livingston”) never had a contract with Alliance. The Custodian’s assistant was informed that Alliance was recommended but not engaged. Notwithstanding, the Custodian produced a document in response to request Item No. 1, pertaining to a different vendor.

For requested Item No. 2, the Township Manager informed the Custodian that it would take one (1) month to search through nineteen (19) boxes of records to find responsive documents. The Custodian certifies that the Township Attorney was able to obtain responsive documents.

Analysis

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).⁵ 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁴ Custodian asserts he received Complainant’s OPRA request on April 2, 2013.

⁵ 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.

Here, the Custodian did not produce responsive documents until May 10, 2013, shortly before submitting his SOI. The Custodian admits the delay in his certification, and does not state whether he requested additional time to respond to the Complainant's OPRA 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 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, GRC 2007-11.

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.

In Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant did not provide any evidence to refute the custodian's certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian lawfully denied access to the requested records because the custodian certified that no records responsive to the request existed.

In this case, although the Custodian's delayed response to the Complainant resulted in a "deemed denial," the Custodian ultimately responded on May 10, 2013, stating that there were no documents responsive to requested Item No. 1, and produced documents responsive to requested Item No. 2. There is no evidence in the record to refute the Custodian's certification that he delivered his response to the Complainant.

Thus, notwithstanding the Custodian's "deemed denial," he responded to the Complainant's OPRA request on May 10, 2013, by stating that there were no responsive documents for Item No. 1, and by producing responsive documents for Item No. 2. Because there is no credible evidence in the record to refute the Custodian's certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, GRC No. 2005-49. Additionally, it is unnecessary for the Council to order disclosure of the responsive documents for Item No. 2, because the Custodian produced the records to the Complainant.

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 (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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant’s OPRA request on May 10, 2013, stating that there were no responsive documents for requested Item No. 1, but produced responsive records for Item No. 2. 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 an 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. Rockaway Twp., GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Notwithstanding the Custodian's "deemed denial," he responded to the Complainant's OPRA request on May 10, 2013, by stating that there were no responsive documents for Item No. 1, and by producing responsive documents for Item No. 2. Because there is no credible evidence in the record to refute the Custodian's certification, the Custodian lawfully denied access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Additionally, it is unnecessary for the Council to order disclosure of the responsive documents for Item No. 2, because the Custodian produced the records to the Complainant.
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian ultimately responded to the Complainant's OPRA request on May 10, 2013, stating that there were no responsive documents for requested Item No. 1, but produced responsive records for Item No. 2. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014