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

September 24, 2013 Government Records Council Meeting

Frances Hall
Complainant
v.
Borough of Lawnside (Camden)
Custodian of Record

Complaint No. 2013-214

At the September 24, 2103 public meeting, the Government Records Council ("Council") considered the September 17, 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 August 27, 2013 Interim Order because she certified that the Borough is disclosing the requested records to the Complainant via e-mail, and provided certified confirmation of compliance to the GRC in a timely manner.

2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council's August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 24th Day of September, 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: September 26, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting

Frances Hall [1] **GRC Complaint No. 2013-214**
Complainant

v.

Borough of Lawnside (Camden)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy of the "Tax Search Export" file produced by the software system used in the Borough of Lawnside ("Borough") Tax Collector's Office containing taxes billed and collected data.

Custodian of Records: Sylvia A. VanNockay, Clerk
Request Received by Custodian: April 23, 2013
Response Made by Custodian: Sometime after May 3, 2013
GRC Complaint Received: July 22, 2013

Background

At its August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 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 did not bear her burden of proof that she timely responded in writing 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 failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the requested records electronically at no cost because, due to the *de minimis* amount of time required to prepare the records for disclosure, a special service charge is unwarranted and there is no appreciable cost

[1] No legal representation listed on record.
[2] Represented by Morris G. Smith, Esq. (Collingswood, NJ).

incurred by the Borough to transmit the requested records electronically. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complainant No. 2009-138 (May 2010).

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with any 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. 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 August 28, 2013, the Council distributed its August 27, 2013 Interim Order to all parties. On August 29, 2013, the first (1^{st}) business day following receipt of the Council's Interim Order, the Custodian sent certified confirmation of compliance to the GRC wherein the Custodian stated that the Borough is disclosing the requested records to the Complainant via e-mail.

Analysis

Compliance

On August 27, 2013, the Council ordered the above-referenced compliance. On August 28, 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 August 29, 2013, one (1) business day after receipt of the Interim Order, the Custodian provided certified confirmation of compliance to the GRC.

Therefore, the Custodian complied with the Council's August 27, 2013 Interim Order because she certified that the Borough is disclosing the requested records to the Complainant via e-mail and provided certified confirmation of compliance to the GRC in a timely manner.

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

[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 record(s) 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.

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)).

The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council's August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 complied with the Council's August 27, 2013 Interim Order because she certified that the Borough is disclosing the requested records to the Complainant via e-mail, and provided certified confirmation of compliance to the GRC in a timely manner.

2. The Custodian's failure to respond in writing within the extended time frame resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g) and 5(i). Furthermore, the Custodian failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. However, the Custodian did fully comply in a timely manner with the Council's August 27, 2013 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive

element of conscious wrongdoing or was intentional and deliberate. Therefore, 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 D. Minde, Esq.
Executive Director

September 17, 2013

INTERIM ORDER

August 27, 2013 Government Records Council Meeting

Frances Hall
Complainant
v.
Borough of Lawnside (Camden)
Custodian of Record

Complaint No. 2013-214

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded in writing 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 failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the requested records electronically at no cost because, due to the *de minimis* amount of time required to prepare the records for disclosure, a special service charge is unwarranted and there is no appreciable cost incurred by the Borough to transmit the requested records electronically. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complainant No. 2009-138 (May 2010).

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with any 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]**

[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 record(s) 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

4. 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.

Interim Order Rendered by the
Government Records Council
On The 27th Day of August, 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: August 28, 2013

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

Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting

Frances Hall[1] **GRC Complaint No. 2013-214**
Complainant

v.

Borough of Lawnside (Camden)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy of the "Tax Search Export" file produced by the software system used in the Borough of Lawnside ("Borough") Tax Collector's Office containing taxes billed and collected data.

Custodian of Records: Sylvia A. VanNockay, Clerk
Request Received by Custodian: April 23, 2013
Response Made by Custodian: Sometime after May 3, 2013
GRC Complaint Received: July 22, 2013

Background[3]

Request and Response:

On April 23, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. The Custodian failed to respond to the request, and on May 3, 2013, the Complainant sent a follow-up request to the Custodian. Sometime after May 3, 2013, in excess of eight (8) business days following receipt of said request, the Complainant stated she received a telephone call from an attorney claiming to represent the Custodian. The Complainant said the attorney told her that the Custodian would send her the requested records electronically every week for an annual cost of $300.00.

Denial of Access Complaint:

On July 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that she provided the OPRA request to the Custodian on April 23, 2013, but never received a response. On May 3, 2013, the Complainant states that she sent a follow-up request to the Custodian and thereafter received a

[1] No legal representation listed on record.
[2] Represented by Morris G. Smith, Esq. (Collingswood, NJ).
[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.

telephone call from an attorney claiming to represent the Custodian. The Complainant states that the attorney told her that the Custodian would send her the requested records electronically every week for an annual cost of $300.00. The Complainant states that she cannot recall the attorney's name or the date she received the telephone call. The Complainant contends she should not have to pay $300.00 each year to obtain electronically transmitted records because it will take only five (5) minutes to prepare and send them electronically.

Statement of Information:

On July 24, 2013, the GRC sent a request for the Statement of Information ("SOI") to the Custodian. The Custodian failed to respond to the GRC's request for the SOI.

Analysis[4]

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

The Complainant asserts that she submitted the OPRA request on April 23, 2013, but did not receive a response until sometime after May 3, 2013, when she received a telephone call from an attorney on behalf of the Custodian informing her that the Custodian would send her the requested records electronically every week for an annual cost of $300.00. The telephonic response was received by the Complainant at least eight (8) business days after the Custodian received the Complainant's OPRA request. Moreover, there is nothing in the evidence of record to indicate that the Custodian forwarded a written response in reply to the Complainant's request.

Therefore, the Custodian did not bear her burden of proof that she timely responded in writing 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*.

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[4] 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.

[5] 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

The Complainant requested an electronic copy of the "Tax Search Export" file produced by the software system used in the Borough Tax Collector's office. Although the Complainant failed to provide the Custodian with either a date or date parameter to specifically identify the file, the Borough's attorney informed the Complainant that the Borough had records responsive to the request. The evidence of record reveals the Borough denied the request, however, pending receipt of a $300.00 payment from the Complainant in return for electronic copies of the records. The Complainant asserted that it will take only five (5) minutes to prepare and send the records electronically and there is nothing in the evidence of record to dispute the Complainant's assertion.

In <u>McBride v. Borough of Mantoloking (Ocean)</u>, GRC Complainant No. 2009-138 (May 2010), the complainant requested a tax search export file from the tax collector's office to be sent via e-mail. The custodian responded by charging the complainant a $10.00 fee in return for electronic copies of the requested records which the complainant alleged was excessive. The Council determined that:

> [b]ecause the Custodian certified that fulfilling the Complainant's OPRA request would take seven (7) minutes and because seven (7) minutes is not an extraordinary amount of time to fulfill an OPRA request, a special service charge is not warranted pursuant to <u>N.J.S.A.</u> 47:1A-5.c. As such…the Custodian must disclose to the Complainant the requested records at the actual cost, pursuant to <u>N.J.S.A.</u> 47:1A-5.b., which is $0.00 because there is no cost incurred by the Borough to transmit the requested records electronically.

Here, the Complainant is seeking the same type of record that was sought in <u>McBride</u>. Here, however, the Complainant contends it will take even less time to prepare and transmit the records electronically. Since the Council determined that a special service charge was not warranted for a seven (7) minute period of time to prepare and transmit to the complainant a tax search export file in <u>McBride</u>, *a fortiori*, a special service charge is not warranted for a five (5) minute period of time to prepare and transmit to the Complainant a tax search export file in the instant complaint. Moreover, the Council in <u>McBride</u> determined that the actual cost of disclosing the records was $0.00 because there was no cost incurred by the Borough of Mantoloking to transmit the requested records electronically.

Accordingly, the Custodian failed to bear her burden of proving that the denial of access to the requested records was authorized by law. <u>N.J.S.A.</u> 47:1A-6. Therefore, the Custodian must disclose to the Complainant the requested records electronically at no cost because, due to the *de minimis* amount of time required to prepare the records for disclosure, a special service charge is unwarranted and there is no appreciable cost incurred by the Borough to transmit the requested records electronically. *See* <u>McBride v. Borough of Mantoloking (Ocean)</u>, GRC Complainant No. 2009-138 (May 2010).

Knowing & Willful

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded in writing 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 failed to bear her burden of proving that the denial of access to the requested records was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose to the Complainant the requested records electronically at no cost because, due to the *de minimis* amount of time required to prepare the records for disclosure, a special service charge is unwarranted and there is no appreciable cost incurred by the Borough to transmit the requested records electronically. *See* McBride v. Borough of Mantoloking (Ocean), GRC Complainant No. 2009-138 (May 2010).

3. **The Custodian shall comply with paragraph 2 above within five (5) business days from receipt of the Council's Interim Order with any 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,[6] to the Executive Director.[7]**

4. 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.

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[6] "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."

[7] Satisfactory compliance requires that the Custodian deliver the record(s) 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.

Prepared By: John E. Stewart, Esq.

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

August 20, 2013