



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

June 24, 2014 Government Records Council Meeting

Stacie Percella
Complainant

Complaint No. 2013-217

v.

City of Bayonne (Hudson)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access or to provide an immediate response to the Complainant’s OPRA requests for timesheets, payroll, and/or overtime records. Additionally, the Custodian’s failure to respond in writing to the Complainant’s June 5, 2013 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).
2. Therefore, notwithstanding the Custodian’s “deemed” denial, the Custodian met his burden of proof that he provided all responsive documents to the Complainant’s June 5, 2013 OPRA request and June 20, 2013 OPRA Request No. 2. N.J.S.A. 47:1A-6. The Custodian certified that no other responsive documents exist and the Complainant has not provided evidence to refute the Custodian’s certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Therefore, because the Custodian performed an inadequate search for all responsive records to the Complainant’s June 20, 2013 OPRA Request No. 1, the Custodian unlawfully denied access to the additional record. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, since the evidence of record indicates that the Complainant already possesses said document, the Council declines to order production.



4. Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-5(e), and performed an insufficient search to the Complainant's June 20, 2013 OPRA Request No. 1, the Custodian certified that all responsive documents have been produced regarding the Complainant's June 5, 2013 OPRA request and her June 20, 2013 OPRA Request No. 2. Furthermore, the evidence of record indicates that the Complainant already possesses the unproduced document responsive to her June 20, 2013 OPRA Request No.1. 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 24th Day of June, 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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Stacie Percella¹
Complainant**

GRC Complaint No. 2013-217

v.

**City of Bayonne (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

June 5, 2013 OPRA Request

All documents each employee filed out/signed stating hours they worked during 10/30/12 – 1/14/13. I am specifically requesting Dept. of Municipal Services form Vanessa Bryant worked out that each employee filled in hours worked + signed. all departments under municipal services.

June 20, 2013 OPRA Request No. 1

Payrolls records of employee Andrew Sharp. Dept. of municipal Services. all payroll records for following dates. Regular Hours worked + overtime pay. Rate of pay. [dates listed from 10/16/12-1/7/13] Any + All documents signed for Hurricane Sandy.

June 20, 2013 OPRA Request No. 2

Municipal Service Dept. form given to employees to sign from Vanessa Bryant, Joe Waks for hours worked for Hurricane Sandy. Employees filled in hours/dates worked + signed form for dates 10/29/12 – 11/9/12. (specifically). All forms under Depts of Municipal Services. All Employees.

Custodian of Record: Robert F. Sloan

Request Received by Custodian: June 5, 2013; June 20, 2013

Response Made by Custodian: June 17, 2013; July 1, 2013; July 16, 2013

GRC Complaint Received: July 23, 2013

¹ No legal representation listed on record.

² Represented by Peter Cecinini, Esq. (Bayonne, NJ).

Background³

Request and Response:

On June 5, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the records set forth above in her June 5, 2013 request. On June 17, 2013, eight (8) business days later, the Custodian responded, in writing, that the requested documents were available for pick-up.

On June 20, 2013, the Complainant submitted two additional OPRA requests to the Custodian seeking the records set forth above as the June 20, 2013 Request Nos. 1 and 2. On July 1, 2013, seven (7) business days later, the Custodian responded to the June 20, 2013 OPRA Request No. 1, in writing, stating that all responsive records have been made available to the Complainant for pick up.

On July 1, 2013, seven (7) business days after receipt of Complainant’s June 20, 2013 Request No. 2, the Custodian responded in writing seeking a two (2) week extension of time to respond. On July 16, 2013, eleven (11) business days after seeking the extension, the Custodian responded to the Complainant, in writing, stating that no responsive records exist.

Denial of Access Complaint:

On July 24, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the records produced were not the requested documents. The Complainant argues that on April 4, 2013, she requested the same documents as in her June 5, 2013 request. In response the Complainant alleges she received the same incorrect documents. Moreover, the Complainant claims that she is looking for a specific type of document she used as an employee with the City of Bayonne.

Additionally, the Complainant states that one of the two OPRA requests she submitted on June 20, 2013 sought the payroll, overtime, and Hurricane Sandy-related records regarding an employee “Andrew Sharp.” The Complainant argues that some of these records are immediate access records pursuant to OPRA. Notwithstanding, the responsive documents were produced seven (7) business days later, on July 1, 2013.

Statement of Information:

On August 15, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he disclosed all responsive documents to each of the Complainant’s OPRA requests.

The Custodian argues that the Complainant is filing these OPRA requests because the Complainant suspects there are employment issues within the City of Bayonne. In response, the

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.

Custodian contends that the Complainant should not be looking to the GRC to adjudicate these allegations. Finally, the Custodian certifies that no other responsive documents exist and the Complainant's claim to the contrary is incorrect.

Additional Submissions:

On October 17, 2013, the Complainant submitted a letter to the GRC claiming that she has not received the requested documents. The Complainant attaches documents provided by her union which she alleges are responsive to her June 20, 2013 OPRA Request No. 1. One such document is a list the Complainant claims is a partial accounting of how much overtime the City of Bayonne ("Bayonne") paid post-Hurricane Sandy, which was reimbursed by the Federal Emergency Management Agency ("FEMA").

Additionally, the Complainant asserts that the document contains a list of employees, including "Andrew Sharp," and the total amount of overtime hours earned and paid to each employee. The Complainant further contends that the document lists any discovered overpayments, which Bayonne had to return to FEMA. According to the document, Mr. Sharp was paid \$2,569 in overtime, but the document does not indicate a date range for the hours worked. Finally, there is no indication as to who compiled the list and its accompanying information. The GRC forwarded the Complainant's October 17, 2013 facsimile to the Custodian on April 22, 2014.

The Custodian responded on May 2, 2014, stating that the documents, which the Complainant alleges were not disclosed; were in fact produced within his SOI.

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).⁴ 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).

OPRA also states that:

"Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual

⁴ 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.

employment contracts, and *public employee salary and overtime information.*”

N.J.S.A. 47:1A-5(e) (emphasis added).

Here, in each of the Complainant’s OPRA requests, she seeks timesheets, payroll, and/or overtime information on all or specific employees at an agency. Each of those documents is an “immediate access” record under OPRA. N.J.S.A. 47:1A-5(e). The Custodian certifies that he responded to the June 5, 2013 OPRA request eight (8) business days later; the June 20, 2013 OPRA Request No. 1 seven (7) business days later; and the June 20, 2013 OPRA Request No. 2 eleven (11) business days, within the two (2) week extension of time to respond.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. Specifically, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access or to provide an immediate response to the Complainant’s OPRA requests for timesheets, payroll, and/or overtime records. Additionally, the Custodian’s failure to respond in writing to the Complainant’s June 5, 2013 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 No. 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.

June 5, 2013 OPRA Request and June 20, 2013 OPRA Request No. 2

The custodian in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), produced one (1) document responsive to the complainant’s OPRA request and stated that no other responsive records exist. The complainant argued that additional responsive records existed. The GRC requested that the custodian certify as to whether all responsive records were produced. On August 1, 2005, the custodian certified that the document provided to the complainant was the only responsive record. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In the instant case, the Custodian certifies that he provided all responsive records to the Complainant’s June 5, 2013 OPRA request and to her June 20, 2013 Request No. 2. Further, there is no evidence in the record to refute the Custodian’s certification.

Therefore, notwithstanding the Custodian's "deemed" denial, the Custodian met his burden of proof that he provided all responsive records to the Complainant's OPRA Request of June 5, 2013 and June 20, 2013 Request No. 2. N.J.S.A. 47:1A-6. The Custodian certified that no other responsive records exist, and the Complainant has not provided evidence to refute the Custodian's certification. Burns, GRC No. 2005-68.

June 20, 2013 OPRA Request No. 1

The Council has maintained that it is among a custodian's duties to do a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails that were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through [the agency's] files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the complainant access to the requested records.

On October 17, 2013, after being informed that no other responsive records existed, the Complainant delivered a facsimile with an attached document she alleges her union obtained from Bayonne. The Complainant claims this document is a partial accounting of how much overtime Bayonne paid post-Hurricane Sandy, which was reimbursed by FEMA. Additionally, the Complainant asserts that the document identified discrepancies in overtime, which Bayonne had to return to FEMA. The document contains a list of Bayonne employees, including "Andrew Sharp," the amount of overtime hours worked, and the total pay earned. Mr. Sharp is listed as a seasonal worker for the City of Bayonne Building Department. Further, the document lists the pay rate per hour of each employee, the number of hours worked in overtime (at 1.5x normal pay and at 2x normal pay), and total gross pay for those hours. The document, however, does not provide a date range for the hours worked, nor does it identify the document's author.

The Complainant explicitly sought the payroll records of an "Andrew Sharp" in her June 20, 2013 OPRA Request No. 1. Upon review, the GRC is satisfied that the document is responsive to the Complainant's request as an immediate access record. Furthermore, notwithstanding the Custodian's May 2, 2014 response to the Complainant's facsimile of October 17, 2013, the document is not among those the Custodian certifies that he provided.

Although the facts in this case differ from Schneble, as the Custodian does not perform a secondary search and certifies that he provided all responsive records to the Complainant, the above-mentioned document was not included in the Custodian's SOI, nor was it contained in his May 2, 2014 letter. Since the document is responsive to the Complainant's June 20, 2013 OPRA Request No. 1, the Custodian performed an insufficient search.

Therefore, because the Custodian performed an inadequate search for all responsive records to the Complainant's June 20, 2013 OPRA Request No. 1, the Custodian unlawfully

denied access to the additional record. N.J.S.A. 47:1A-6; Schneble, GRC No. 2007-220. However, since the evidence of record indicates that the Complainant already possesses said document, the Council declines to order production.

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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and N.J.S.A. 47:1A-5(e), and performed an insufficient search to the Complainant’s June 20, 2013 OPRA Request No. 1, the Custodian certified that all responsive documents have been produced regarding the Complainant’s June 5, 2013 OPRA request and her June 20, 2013 OPRA Request No. 2. Furthermore, the evidence of record indicates that the Complainant already possesses the unproduced document responsive to her June 20, 2013 OPRA Request No.1. 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access or to provide an immediate response to the Complainant's OPRA requests for timesheets, payroll, and/or overtime records. Additionally, the Custodian's failure to respond in writing to the Complainant's June 5, 2013 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).

2. Therefore, notwithstanding the Custodian's "deemed" denial, the Custodian met his burden of proof that he provided all responsive documents to the Complainant's June 5, 2013 OPRA request and June 20, 2013 OPRA Request No. 2. N.J.S.A. 47:1A-6. The Custodian certified that no other responsive documents exist and the Complainant has not provided evidence to refute the Custodian's certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Therefore, because the Custodian performed an inadequate search for all responsive records to the Complainant's June 20, 2013 OPRA Request No. 1, the Custodian unlawfully denied access to the additional record. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, since the evidence of record indicates that the Complainant already possesses said document, the Council declines to order production.
4. Although the Custodian violated N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i) and N.J.S.A. 47:1A-5(e), and performed an insufficient search to the Complainant's June 20, 2013 OPRA Request No. 1, the Custodian certified that all responsive documents have been produced regarding the Complainant's June 5, 2013 OPRA request and her June 20, 2013 OPRA Request No. 2. Furthermore, the evidence of record indicates that the Complainant already possesses the unproduced document responsive to her June 20, 2013 OPRA Request No.1. 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.
Acting Executive Director

June 17, 2014