



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

February 25, 2014 Government Records Council Meeting

Ramona G. Owens
Complainant

Complaint No. 2013-233

v.

Mt. Holly Township (Burlington)
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 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 her 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian’s failure to respond in a timely manner, because she certified in the Statement of Information that the Township provided access to all responsive records in the Township’s possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian’s certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); Cole v. Township of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012); Valdes v. Township of Belleville (Essex), GRC Complaint No. 2012-181 (June 2013).
3. Although the Custodian untimely response resulted in a “deemed” denial of the Complainant’s OPRA request, the Custodian did not unlawfully deny access to any requested records because she provided all records that existed in the Township’s possession. 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 untimely response 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 25th Day of February, 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: February 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2014 Council Meeting**

**Ramona G. Owens¹
Complainant**

GRC Complaint No. 2013-233

v.

**Mt. Holly Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of reports and photographs of a damaged wall in the Complainant's apartment on December 17, 2010.

Custodian of Record: Vicky M. Conover

Request Received by Custodian: July 11, 2013

Response Made by Custodian: July 23, 2013

GRC Complaint Received: August 12, 2013

Background³

Request and Response:

On July 10, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 23, 2013, the eighth (8th) business day after receipt of the request, the Custodian responded in writing via e-mail providing the Complainant with a "Notice of Violation and Order to Correct Identification" form for the Complainant's apartment. Further, the Custodian stated that the Housing Office did not possess any photographs of the damage.

Denial of Access Complaint:

On August 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed that no photos of the damaged wall existed. The Complainant further contended that the Custodian did not provide either a heater service or roofing company certification to support that these two (2) violations were corrected.

¹ No legal representation listed on record.

² Represented by George Saponaro, Esq., of Saponaro & Sitzler (Mt. Holly, 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.

Statement of Information:

On September 27, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 11, 2013 and responded on July 23, 2014.

The Custodian certified that upon information and belief, Code Enforcement officers took photos; however, said photos no longer exist. The Custodian affirmed the understanding that a former Code Enforcement employee had the photos on a computer; however, she attempted but was unable to locate the computer and determined it is no longer in the possession of Mt. Holly Township (“Township”). Having failed to locate the computer, the Custodian certified that she searched the Township’s server and was unable to locate any photos.

The Custodian certified that all records in its possession that are responsive to the Complainant’s OPRA request were provided to her and no other records exist.

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).

Here, the Custodian certified in the SOI that she received the OPRA request on July 11, 2013 and responded on July 23, 2013, the eighth (8th) business day after receipt of the request. In the absence of any certification impacting the calculation of the time frame, the Custodian failed to timely respond to the OPRA request.

Therefore, the Custodian did not bear her 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.

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.

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.

OPRA states that in the adjudication of a denial of access complaint, a custodian must bear the burden of proving that any denial of access is authorized by law. N.J.S.A. 47:1A-6. In this matter, the Custodian certified that although the responsive photographs existed at some point, the Township was unable to locate same after an exhaustive search for both a former employee’s computer and of the Township server. Further, the Custodian certified that she provided to the Complainant all records in the Township’s possession, thus addressing the Complainant’s dispute regarding heater service and roofing company certification. Additionally, there is no evidence in the record to refute the Custodian’s certification.

Therefore, notwithstanding the Custodian’s failure to respond in a timely manner, because she certified in the SOI that the Township provided access to all responsive records in the Township’s possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian’s certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant’s OPRA request because the Custodian provided all records that existed); Cole v. Township of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012); Valdes v. Township of Belleville (Essex), GRC Complaint No. 2012-181 (June 2013).

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 untimely response resulted in a "deemed" denial of the Complainant's OPRA request, the Custodian did not unlawfully deny access to any requested records because she provided all records that existed in the Township's possession. 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 untimely response 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 her 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Notwithstanding the Custodian's failure to respond in a timely manner, because she certified in the Statement of Information that the Township provided access to all responsive records in the Township's possession, the Custodian did not unlawfully deny access to any requested records. Moreover, there is no competent, credible evidence in the record to refute the Custodian's certification. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)(holding that the Custodian did not unlawfully deny access to Complainant's OPRA request because the Custodian provided all records that existed); Cole v. Township of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012); Valdes v. Township of Belleville (Essex), GRC Complaint No. 2012-181 (June 2013).
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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: Frank F. Caruso
Senior Case Manager

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

February 18, 2014