



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Dave Weippert
Complainant

Complaint No. 2013-358

v.

Borough of Netcong (Morris)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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 she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to request the extension of time to respond with an anticipated deadline date of when the requested records will be made available results in a “deemed” denial of the Complainant’s OPRA request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Starkey v. New Jersey Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Custodian has borne her burden of proving that she did not unlawfully deny access to the requested records because upon her receipt of a request for records maintained by the NCP, she directed the Complainant to resubmit those request items to the NCP Director. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(h); Kumka (North Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (July 2007); Fallstick v. Haddon Township and Haddon Township Business Partnership, Inc., GRC Complaint No. 2004-73 (October 2004). Additionally, the Custodian certified that all of the responsive records maintained by the Borough were provided to the Complainant, and there exists no evidence in the record to refute such a certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011).
3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian directed the Complainant to the NCP Director and provided the



Complainant with all records responsive to the request. 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 29th Day of July, 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: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Dave Weippert¹
Complainant**

GRC Complaint No. 2013-358

v.

**Borough of Netcong (Morris)²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: Copy of all amendments to Ordinance 2001-20 regarding the creation of the Special Improvement District (“SID”) and District Management Corporation (“DMC”).

Item No. 2: Copy of current bylaws, policies, and procedures adopted by SID and/or Netcong Community Partnership (“NCP”).

Item No. 3: Copies of Minutes from all SID and/or NCP meetings from January 2010 to present.

Item No. 4: Copy of SID 2010-2013 budgets and accompanying reports.

Item No. 5: Copies of Borough Council 2010-2013 resolutions approving SID annual budgets.

Item No. 6: Copies of SID or DMC annual reports for 2010-2013.

Item No. 7: List of all Board of Trustees, officers, and members of SID and/or NCP for 2013.

Item No. 8: List of all employees, job descriptions, and salaries of SID and/or NCP for 2010-2013.

Item No. 9: Names and addresses of all businesses contributing to SID and/or NCP, plus the yearly assessments for each, for 2010-2013.

Item No. 10: List of all SID and/or NCP gifts, grants, donations, and loans, plus amounts of each received, from January 2010 to present.

Item No. 11: List of all SID and/or NCP disbursements from January 2010 to present.

¹ No legal representation listed on record.

² Represented by James T. Bryce, Esq. (Riverdale, N.J.)

Custodian of Record: Cynthia Eckert
Request Received by Custodian: November 15, 2013
Response Made by Custodian: November 21, 2013
GRC Complaint Received: December 10, 2013

Background³

Request and Response:

On November 15, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 21, 2013, four (4) business days later, the Custodian responded via email by stating that she had been out sick all week with the flu and would complete the OPRA request as soon as she returned to work. On November 27, 2013, eight (8) business days after the initial request, the Custodian provided the Complainant with Items No. 1, 2, 5, and 9, and noted that she would send the other information as soon as she received it from the NCP Director. On December 2, 2013, following in inquiry from the Complainant, the Custodian provided the NCP’s 2012 budget and informed him that she was still waiting for the rest of the information.

On December 4, 2013, the Custodian informed that Complainant that his request for records maintained by the NCP, specifically Items No. 3, 6, 7, 8, 10, and 11, should be made to the NCP Director. On December 5, 2013, after Complainant asked why he needed to resend his request when the Custodian had already contacted the NCP Director, the Custodian stated that NCP records are not Borough records.

Denial of Access Complaint:

On December 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the NCP and SID are under the jurisdiction of the Borough of Netcong (“Borough”) and, therefore, the Custodian is responsible for the provision of the requested records. In support of this argument, the Complainant states that: (1) the NCP and SID were established by Borough ordinance in 2001; (2) the ordinance requires these entities to provide budgets and annual reports to be approved by the Borough Council; (3) the ordinance requires the collection of special assessments from commercial properties in the Borough; and (4) the ordinance requires the Mayor, Borough Administrator, and a Borough Council representative to be members of the NCP Board of Trustees.

Additionally, the Complainant contends that the Custodian’s response was not timely because she did not indicate a specific timeframe as to when she would provide the requested records. Further, the Complainant argues that, in her final response, the Custodian did not disclose to him the NCP Director’s phone number, email, or address.

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 January 23, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the request on November 15, 2013 and initially replied on November 21, 2013. The Custodian additionally certifies that some of the requested records were made, maintained, filed or received by the Borough, and that the balance of the documents are within the exclusive control of the NCP. Further, the Custodian certifies that she supplied the Complainant with all records responsive to the request that were kept on file, received, or within the control of the Borough of Netcong.

The Custodian states that OPRA defines a “custodian of a government record” in municipalities as the municipal clerk and, “in the case of any other public agency, the officer officially designated by formal action of that agency’s director or governing body” *Citing N.J.S.A. 47:1A-1.1.* The Custodian argues that the Borough is a distinct legal entity from the NCP, which was created to manage the SID. As a result, the Custodian contends, she is not the custodian of all of the records requested because she is the custodian for only the municipality, and she cannot force a separate agency to supply the Complainant with records.

Additionally, the Custodian argues that a legitimate one (1) day extension was impliedly sought through her email to the Complainant informing him that she had been out of the office due to the flu and would respond as soon as she had returned. The Custodian states that the Complainant’s reply wishing her to feel better was perceived to be a granting of this extension.

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).

In order to seek a valid extension of time to respond, a custodian must request the extension in writing within the statutorily mandated seven (7) business days and provide an anticipated deadline date of when the requested records will be made available. *See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Rivera v. City of Plainfield Police Dep’t (Union)*, GRC Complaint No. 2009-317 (May 2011); Starkey v. N.J. Dep’t of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009). Further, the Council has previously found

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.

that a custodian violated OPRA's timeliness provisions when she responded to a request nine (9) business days after receiving it because she had been ill. See Gelber v. City of Hackensack (Bergen), GRC Complaint No. 2011-148 (June 2012).

Here, the Custodian initially responded to the Complainant in writing four (4) business days after receiving the request by stating that she had been ill all week and would complete the request when she returned to work. The Custodian then provided the Complainant with the responsive documents eight (8) and ten (10) days after receiving the request. Thus, the Custodian first replied within the seven (7) business day timeframe, but she did not specify a date certain in her request for an extension of time to respond. Though the Custodian had been ill, this did not absolve her of her responsibility under OPRA to provide an anticipated deadline date of when the requested records would be made available. See Gelber, GRC 2011-148.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to request the extension of time to respond with an anticipated deadline date of when the requested records would be made available results in a "deemed" denial of the Complainant's OPRA request. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Rivera, GRC 2009-317; Starkey, GRC 2007-315, *et seq.*

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.

As a threshold matter, the Council has previously determined that Special or Business Improvement Districts, and entities designated by municipalities to manage such Districts, established pursuant to N.J.S.A. 40:56-65 et seq. are subject to OPRA. See N.J.S.A. 47:1A-1.1; Kumka (N. Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (July 2007); Haelig v. Seaside Heights Bus. Improvement Dist., GRC Complaint No. 2005-50 (December 2006); Fallstick v. Haddon Twp. and Haddon Twp. Bus. P'ship, Inc., GRC Complaint No. 2004-73 (October 2004).

In turn, OPRA states that:

[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

N.J.S.A. 47:1A-5(h).

It is a custodian's duty to either direct a complainant to the proper custodian of record or forward a complainant's OPRA request to the proper custodian of record for another public agency when that agency's files are not maintained by the agency in receipt of the request. Id.

Further, in Fallstick, the complainant filed an OPRA request with the Haddon Township custodian requesting to inspect minutes of the marketing committee meetings of the Haddon Township Business Partnership ("HTBP") and copies of letters from property owners to business owners. Fallstick, GRC 2004-73. The complainant asserted that Haddon Township should have had the requested records on file because of an ordinance designating HTBP as the manager of services and programs in the Township's Business District. Id. The Council found that the HTBP was a public agency subject to OPRA, but that the Haddon Township Custodian was not obligated to respond to an OPRA request for records maintained by HTBP. Id. Similarly, in Kumka, the Council held that a request made to the City of Englewood's custodian for records maintained by the Englewood Economic Development Corporation ("EEDC") should have been forwarded to the EEDC, or the complainant should have been directed to the proper custodian there. Kumka, GRC 2007-7.

Lastly, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian certified that the record provided to the complainant was the only record responsive to the request. Id. The Council found that there had thus been no unlawful denial of access. Id. See also Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011) (holding custodian did not unlawfully deny access when he certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification).

Here, the record shows that the NCD, created by the Borough Council to manage the SID, is a public agency for the purposes of OPRA. See N.J.S.A. 47:1A-1.1; Kumka, GRC 2007-07; Haelig, GRC 2005-50; Fallstick, GRC 2004-73. The Complainant requested a series of records, a portion of which the Custodian states are within the exclusive control of the NCP. Thus, as in Fallstick and Kumka, the Borough Custodian had a responsibility pursuant to N.J.S.A. 47:1A-5(h) to either pass the request to the NCP or to direct the Complainant to the appropriate individual at the NCP. The record indicates that the Custodian informed the Complainant in a December 4, 2013 email that he should direct his request for Items No. 3, 6, 7, 8, 10, and 11 to the named NCP Director because such records are "maintained by the NCP . . ." Additionally, the Custodian certified that she supplied "all responsive records within [the] Agency's and Custodian's control."

Therefore, the Custodian has borne her burden of proving that she did not unlawfully deny access to the requested records because upon her receipt of a request for records maintained by the NCP, she directed the Complainant to resubmit those request items to the NCP Director. See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(h); Kumka, GRC 2007-07; Fallstick, GRC 2004-73. Additionally, the Custodian certified that all of the responsive records maintained by the Borough were provided to the Complainant, and there exists no evidence in the record to refute such a certification. See Kohn, GRC 2009-203 & 2009-211; Burns, GRC 2005-68.

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 directed the Complainant to the NCP Director and provided the Complainant with all records responsive to the request. 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 her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to request the extension of time to respond with an anticipated deadline date of when the requested records will be made available results in a “deemed” denial of the Complainant’s OPRA request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Starkey v. New Jersey Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

2. The Custodian has borne her burden of proving that she did not unlawfully deny access to the requested records because upon her receipt of a request for records maintained by the NCP, she directed the Complainant to resubmit those request items to the NCP Director. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(h); Kumka (North Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (July 2007); Fallstick v. Haddon Township and Haddon Township Business Partnership, Inc., GRC Complaint No. 2004-73 (October 2004). Additionally, the Custodian certified that all of the responsive records maintained by the Borough were provided to the Complainant, and there exists no evidence in the record to refute such a certification. *See* Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011).

3. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian directed the Complainant to the NCP Director and provided the Complainant with all records responsive to the request. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014