



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

Scott Coulson
Complainant

Complaint No. 2013-360

v.

Town of Kearny Fire Department (Hudson)
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’s December 2, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Items No. 2, No. 4, and No. 5 because she certified that no responsive records exist, and there exists no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Items No. 1, No. 3, and No. 6 because she made the records responsive to the request, if they existed, available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009); Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008); Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). *See also* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing a legally insufficient response to the Complainant's request, she has made available, upon receipt of payment, the records responsive to the Complainant's request. Further, 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**

**Scott Coulson¹
Complainant**

GRC Complaint No. 2013-360

v.

**Town of Kearny Fire Department (Hudson)²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: The document reflecting that the Township of Kearny Fire Department (“Fire Department”) did not receive any checks or reimbursement money from the Town of Kearny’s (“Town’s”) insurance company.

Item No. 2: Copies of checks and reimbursements the Fire Department received from FEMA, the Town, the Town’s insurance company, or any other source, because of the storm on October 29 and 30, 2012.

Item No. 3: Copies of checks and reimbursements to the Town, from FEMA and the Town’s insurance company.

Item No. 4: Copies of the checks and documents showing the Town forwarded money to the Fire Department relating to the storm of October 29 and 30, 2012.

Item No. 5: A copy of the engineer’s report, architect’s report, and health department report that closed, condemned, or dissolved the use of Fire Station No. 4 located at 2 John Miller Way (“Station No. 4”).

Item No. 6: Copies of the engineer’s report, architect’s report, and the health department report that reopened the Station No. 4.

Custodian of Record: Patricia Carpenter

Request Received by Custodian: November 22, 2013

Response Made by Custodian: December 2, 2013; December 18, 2013

GRC Complaint Received: December 12, 2013

¹ No legal representation listed on record.

² Represented by Gregory Castano, Sr., Esq. (Fairfield, N.J.).

Background³

Request and Response:

On November 22, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 2, 2013, five (5) business days later, the Custodian responded, via email, by stating that responsive documents could be retrieved from the Town upon the payment of copying costs. The Custodian noted that she was awaiting a reply to an inquiry she had made regarding Item No. 5, but that she would contact the Complainant as soon as she heard back. On December 18, 2013, the Custodian emailed the Complainant to state that, in response to Item No. 5, there were no additional documents related to the closure or condemnation of Station No. 4. Also, the Custodian reiterated that the responsive documents were still available for retrieval upon payment of the duplication cost.

Denial of Access Complaint:

On December 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he did not receive any correspondence regarding his request from anyone.

Statement of Information:

On January 30, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s request on November 22, 2013 and responded on both December 2, 2013 and December 18, 2013. The Custodian states that she has twice contacted the Complainant to inform him that the responsive documents were available for pick up, but that he has neither acknowledged these communications nor retrieved the documents. Additionally, the Custodian provided the Town’s original responses to Items No. 1 through No. 6, which were to be included with the documents made available to the Complainant:

1. Reimbursement from the Town’s Insurance Company with respect to the storm on October 29th/30th, 2012 was paid to the Town[.]
2. Reimbursement for the storm on October 29th/30th, 2012 was paid to the [Town] and not the [Fire Department].
3. Attached are the checks and proof of electronic reimbursements to the [Town] from the Middlesex County Municipal Joint Insurance Fund . . . and FEMA with reference to the storm on October 29th/30th, 2012.[.]
4. Non-applicable. No such documents exist.

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.

5. I am currently awaiting a response in reference to [Item No. 5]. This document(s) will be available by the end of next week.
6. Attached is a Temporary Certificate of Occupancy/Compliance, and the Architect's Report, with respect to the reopening of [Fire Station No. 4]. An Engineer's report and a Health Department report for [Fire Station No. 4] do not exist.

The Custodian argues that she did not deny the Complainant access to any of the requested records as, with regards to Items No. 1 and No. 2, she has made available for pick up documents reflecting that all responsive checks were made out to the Town, not the Fire Department. Further, the Custodian certifies that no documents responsive to Items No. 4 and No. 5 exist, and, similarly, nor do any engineer's or health department reports responsive to Item No. 6.

Analysis

Timeliness & Sufficiency of Response

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).

Further, OPRA specifically states that a custodian "shall indicate the specific basis [for denial of access]" N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

[a]lthough the Custodian responded in writing to the Complainant's . . . OPRA request . . . pursuant to N.J.S.A. 47:1A-5(i), the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Id.

A custodian also has an obligation to provide the requestor with an anticipated deadline date upon which the requested records will be provided. In Hardwick v. N.J. Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian requested, in

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.

writing, an extension of time to respond but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council subsequently held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i). Id.

Here, the Custodian responded, in writing, five (5) business days after receiving the Complainant's request by indicating that responsive documents were available for retrieval. However, the record indicates that the Custodian's email to the Complainant did not contain the specific, item by item response that was attached to the documents made available for pick up. Additionally, regarding Item No. 5, the Custodian told the Complainant that he would be informed when she had received a reply to her own request for information. Thus, the Custodian's response did not address each item contained in the Complainant's OPRA request or specify a date certain on which the Complainant could expect access to be granted or denied to Item No. 5.

Therefore, the Custodian's December 2, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied to Item No. 5. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272); Hardwick, GRC 2007-164.

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.

Items No. 2, No. 4, & No. 5

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that no records responsive to Items No. 2, No. 4, and No. 5 exist, and there is no evidence in the record to refute such certification.

Therefore, the Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Items No. 2, No. 4, and No. 5 because she certified that no responsive records exist, and there exists no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Items No. 1, No. 3, & No. 6

OPRA further states that

If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

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

In Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), in reaffirming that the custodian was “not required to release the requested records until payment is received” Id. The Council subsequently held in Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009), that the custodian had complied in part with the Council’s Interim Order “by advising that the requested records would be provided upon payment of copying costs” Id. (citing N.J.S.A. 47:1A-5(b); Mejias v. N.J. Dep’t of Corr., GRC Complaint No. 2007-181 (July 2008); Paff, GRC 2006-54).

Here, the Custodian stated, and the record indicates, that she informed the Complainant that copies of the records responsive to Items No. 1, No. 3, and a portion of No. 6 are available for retrieval upon his payment of the copying costs, but that the Custodian has not received such payment. Additionally, the Custodian certified that no records responsive to the portions of Item No. 6 seeking an engineer’s or health department report exist. *See* Pusterhofer, GRC 2005-49.

Therefore, the Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Items No. 1, No. 3, and No. 6 because she made the records responsive to the request, if they existed, available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak, GRC 2007-148; Ortiz, GRC 2007-101; Mejias, GRC 2007-181; Paff, GRC 2006-54. *See also* Pusterhofer, GRC 2005-49.

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) by providing a legally insufficient response to the Complainant's request, she has made available, upon receipt of payment, the records responsive to the Complainant's request. Further, 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's December 2, 2013 response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request and failed to specify a date certain on which the Complainant could expect access to be granted or denied. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008); Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. The Custodian has borne her burden of proving that she lawfully denied access to the documents requested in Items No. 2, No. 4, and No. 5 because she certified that no responsive records exist, and there exists no evidence in the record to refute such certification. *See* N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian has borne her burden of proving that she did not unlawfully deny access to the record requested in Items No. 1, No. 3, and No. 6 because she made the records responsive to the request, if they existed, available upon payment of the appropriate copying costs. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-5(b); Leak v. Union County Prosecutor's Office, GRC Complaint No. 2007-148 (June 2009); Ortiz v. N.J. Department of Corrections, GRC Complaint No. 2007-101 (November 2008); Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). *See also* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by providing a legally insufficient response to the Complainant's request, she has made available, upon receipt of payment, the records responsive to the Complainant's

request. Further, 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.
Senior Counsel

July 22, 2014