



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

Larry A. Kohn
Complainant

Complaint No. 2013-363

v.

Township of Livingston (Essex)
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 failure to respond in writing to the Complainant’s clarification 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 for Item No. 2. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian bore his burden of proving that did not unlawfully denied access to Item No. 1 because he certified that no responsive records exist, and the Complainant provided no clarification of his request when the Custodian sought to obtain same. See N.J.S.A. 47:1A-6; Schilling v. Township of Little Egg Harbor (Ocean), GRC Complaint No. 2011-293 (March 2013); Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012); Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005); Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The Custodian bore his burden of proving that he did not unlawfully denied access to Item No. 2 because he certified that all responsive records have been provided to the Complainant. See N.J.S.A. 47:1A-6; Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did conduct an additional search in order to satisfy the Complainant’s



request and did not unlawfully deny him access to the requested records. 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**

**Larry A. Kohn¹
Complainant**

GRC Complaint No. 2013-363

v.

**Township of Livingston (Essex)²
Custodial Agency**

Records Relevant to Complaint:

Item No. 1: LeeBoy 5000 mtce records.

Item No. 2: Map of Circle Fire House site that was displayed at 11/11/13 conference meeting.

Custodian of Record: Glen Turtletaub

Request Received by Custodian: November 15, 2013

Response Made by Custodian: November 26, 2013

GRC Complaint Received: December 18, 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 26, 2013, seven (7) business days later, the Custodian responded by stating that no maintenance records responsive to Item No. 1 existed, by seeking clarification if the Complainant sought another record in Item No. 1, and by providing a map he said was responsive to Item No. 2.

On December 2, 2013, the Custodian received a letter from the Complainant dated December 1, 2013 asking when he could anticipate a response to his OPRA request. On December 17, 2013, the Custodian provided a letter to the Complainant via email stating that his request had been replied to on November 26, 2013 and listing the email addresses to which the reply had been sent.

¹ No legal representation listed on record.

² Represented by Sharon L. Weiner, Esq. (Riverdale, N.J.)

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.

On December 18, 2013, the Complainant wrote to the Custodian to state that he checked his email account and corresponding “junk” folder and had not found the Custodian’s November 26, 2013 email, and to ask that the Custodian resend the original response. That same day, the Custodian forwarded the initial response to the Complainant. The Complainant responded hours later reiterating that he had not received the November 26, 2013 correspondence, and by stating that the map attached in response to Item No. 2 did not depict the Circle Fire House Site.

Denial of Access Complaint:

On December 18, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he received no reply from the Custodian to either his November 15, 2013 request or his subsequent letter dated December 1, 2013 inquiring about the status of said request.

Additional Party Submissions:

On December 19, 2013, subsequent to the filing of this complaint, the Custodian emailed the Complainant to state that the Township Attorney had been copied on the original reply and had received it at that time. The Complainant responded that day informing the Custodian that he still wished to receive the requested information via email. In a letter dated December 30, 2013, he asked when he could anticipate receiving the requested map, rather than “a map of the entire community.”

On January 9, 2014, the Custodian replied to the Complainant’s December 30, 2013 letter by providing a copy of the “Eisenhower Parkway Site Map displayed at” the November 11, 2013 Council Meeting referenced in the request.

Statement of Information:

On February 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the request on November 15, 2013 and responded on November 26, 2013. The Custodian notes that the map provided on November 26, 2013 in response to Item No. 2 was believed to be responsive to the request because it was part of a presentation made at the Township’s November 11, 2013 Council Meeting, and it depicted the Circle Fire House site along with all other “Open Space Parcels” in the Township. Further, the Custodian states that upon his receipt of the Complainant’s December 18, 2013 email, he contacted the Township Engineer and Township Manager to determine if there existed an additional record responsive to Item No. 2, and that the map subsequently located was disclosed to the Complainant on January 9, 2014.

The Custodian contends that the Complainant has provided no objection or clarification in response to Item No. 1. Additionally, the Custodian argues that he responded to the request in a timely manner, and that the responsive documents were ultimately provided to the Complainant.

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, in Wadhams v. Town of Belvidere (Warren), GRC Complaint No. 2010-209 (October 2011), the complainant stated that she did not receive a response from the custodian to either her OPRA request or follow-up email. The custodian, however, certified that the responsive record was timely provided to the complainant. Id. As the record contained no competent, credible evidence to refute the certification, the Council found that there had been no unlawful denial of access. Id. See also Gartner v. Middlesex Borough (Middlesex), GRC Complaint No. 2013-93 (October 2013).

Here, the Custodian certified that he received the Complainant's request on November 15, 2013 and responded on November 26, 2013. In turn, the SOI submitted by the Custodian contained his November 26, 2013 email. There exists no evidence in the record to refute the Custodian's certifications regarding his initial timely response.

However, the Complainant informed the Custodian on December 18, 2013 that he was seeking a map that specifically displayed the Circle Fire House site, not the Township as a whole. Upon receipt of this clarification, the Custodian again had seven (7) business days to either grant access, deny access, seek clarification or request an extension of time. The Custodian's January 9, 2013 email reply to the Complainant attaching the additional responsive map came fourteen (14) business days later.

Therefore, the Custodian's failure to respond in writing to the Complainant's clarification 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 for Item No. 2. See N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); 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.

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). Similarly, the Council has found no unlawful denial of access when a custodian certified that he provided all responsive records to complainant, and there existed no credible evidence in record to refute such certification. See Kohn v. Twp. of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

Additionally, the Council has determined that a custodian bore her burden of proving a lawful denial of access when she sought written clarification of a request but received no reply from the complainant. See Schilling v. Twp. of Little Egg Harbor (Ocean), GRC Complaint No. 2011-293 (March 2013); Herron v. N.J. Dep’t of Educ., GRC Complaint No. 2011-363 (December 2012); Moore v. Twp. of Old Bridge, GRC Complaint No. 2005-80 (August 2005).

Here, the Custodian certified that no records responsive to Item No. 1 exist, and there is no evidence in the record to refute such certification. Further, the Complainant did not provide clarification to the Custodian regarding Item No. 1. Relatedly, the Custodian certified that all records responsive to Item No. 2 were disclosed to the Complainant.

Therefore, the Custodian bore his burden of proving that did not unlawfully denied access to Item No. 1 because he certified that no responsive records exist, and the Complainant provided no clarification of his request when the Custodian sought to obtain same. See N.J.S.A. 47:1A-6; Schilling, GRC 2011-293; Herron, GRC 2011-363; Moore, GRC 2005-80; Pusterhofer, GRC 2005-49. Likewise, the Custodian bore his burden of proving that he did not unlawfully denied access to Item No. 2 because he certified that all responsive records have been provided to the Complainant. See N.J.S.A. 47:1A-6; 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 did conduct an additional search in order to satisfy the Complainant’s request and did not unlawfully deny him access to the requested records. 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’s failure to respond in writing to the Complainant’s clarification 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 for Item No. 2. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian bore his burden of proving that did not unlawfully denied access to Item No. 1 because he certified that no responsive records exist, and the Complainant provided no clarification of his request when the Custodian sought to obtain same. *See* N.J.S.A. 47:1A-6; Schilling v. Township of Little Egg Harbor (Ocean), GRC Complaint No. 2011-293 (March 2013); Herron v. New Jersey Department of Education, GRC Complaint No. 2011-363 (December 2012); Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005); Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. The Custodian bore his burden of proving that he did not unlawfully denied access to Item No. 2 because he certified that all responsive records have been provided to the Complainant. *See* N.J.S.A. 47:1A-6; Kohn v. Township of Livingston, GRC Complaint No. 2009-203 & 2009-211 (January 2011); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did conduct an additional search in order to satisfy the Complainant's request and did not unlawfully deny him access to the requested records. 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