



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

November 18, 2014 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-207

v.

NJ Office of the Attorney General
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 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. Custodian Bruce Solomon did not bear his 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian failed to respond to the Complainant’s request within the required seven (7) business days, resulting in a “deemed” denial, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and 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 18th Day of November, 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: November 20, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-207

v.

**State of New Jersey Office of the Attorney General²
Custodial Agency**

Records Relevant to Complaint:

1. Résumés on file for DAG Andrew J. McNally, DAG Bruce J. Solomon, and DAG Christopher Huber.
2. Pursuant to N.J.S.A. 47:1A-10(a), salary and date of hire for DAG Andrew J. McNally, DAG Bruce J. Solomon, and DAG Christopher Huber.

Custodian of Records: DAG Gregory A. Spellmeyer³

Request Received by Custodian: May 9, 2014

Response Made by Custodian: May 21, 2014

GRC Complaint Received: May 27, 2014

Background⁴

Request and Response:

On May 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, DAG Bruce Solomon, seeking the above-mentioned records. On May 21, 2014, the eighth (8th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that because he was a named defendant in a Superior Court action filed by the Complainant, he needed an extension of time until May 27, 2014, in order to assign an Acting Custodian to grant or deny access. DAG Solomon stated that an Acting Custodian was necessary to avoid any real or perceived conflicts.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Gregory A. Spellmeyer.

³ DAG Spellmeyer is the Acting Custodian of Records in this matter.

⁴ 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.

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Denial of Access Complaint:

On May 27, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he filed his OPRA request on May 9, 2014 and the Custodian responded to the request on May 20, 2014 at 5:50 p.m. The Complainant asserts that because the Custodian responded after normal business hours on the eighth (8th) business day, his response was not made until the ninth (9th) business day. The Complainant asks the Council to find that the Custodian did not respond to the Complainant’s OPRA request within the statutory-mandated time frame of “no later than seven business days.”⁵

Statement of Information:

On June 6, 2014, the Acting Custodian filed a Statement of Information (“SOI”). The Acting Custodian certifies that the Custodian received the Complainant’s OPRA request on May 9, 2014, and responded to the request in writing on May 21, 2014, informing the Complainant that an extension of time until May 27, 2014 would be necessary to assign an Acting Custodian in order to avoid a potential conflict of interest. The Acting Custodian certifies that on May 23, 2014, he disclosed to the Complainant existing records responsive to the request in redacted form.

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).⁶ 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian responded in writing to the Complainant on May 21, 2014, which is the eighth (8th) business day following receipt of said request. The Custodian informed the

⁵ The Complainant’s sole issue here is that there is a “deemed” denial of his records request because the Custodian did not respond to his request in a timely manner. Although the evidence of record reveals that the Acting Custodian responded to the request on May 23, 2013, by disclosing responsive records not otherwise exempt, the Complainant did not await receipt of the Acting Custodian’s actions because the record reveals the Complainant verified his complaint on May 22, 2014. Moreover, after receiving the records the Complainant did not file an Amended Denial of Access Complaint or otherwise raise any issues with respect to the disclosed records.

⁶ 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.

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Complainant that due to a potential conflict, he needed an extension of time until May 27, 2014, in order to assign an Acting Custodian to grant or deny access.⁷

Therefore, Custodian Bruce Solomon did not bear his 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.

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 (Berg); 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)).

Here, although the Custodian failed to respond to the Complainant's request within the required seven (7) business days, resulting in a "deemed" denial, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

⁷ It is immaterial whether the Custodian responded in writing to the Complainant's request on the eighth (8th) or ninth (9th) business day, because the Custodian's failure to respond within seven (7) business days results in a "deemed" denial.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Custodian Bruce Solomon did not bear his 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Although the Custodian failed to respond to the Complainant's request within the required seven (7) business days, resulting in a "deemed" denial, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

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

November 10, 2014