



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

January 30, 2015 Government Records Council Meeting

Cynthia Zirkle
Complainant

Complaint No. 2014-212

v.

Fairfield Township (Cumberland)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 Supplemental 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 current Custodian only partially complied with the Council’s November 18, 2014 Interim Order because although she responded within the extended time frame providing responsive records to the Complainant, she failed to simultaneously provide valid certified confirmation of compliance to the Executive Director, as explicitly directed in the Order, until after the expiration of the extended time frame.
2. Although the original Custodian failed to respond to the Complainant’s OPRA request, the interim Custodian failed to submit a Statement of Information and the current Custodian only partially complied with the Council’s November 18, 2014 Interim Order, the current Custodian did provide responsive records to the Complainant on December 5, 2014. Thus, the evidence of record does not indicate that any of the Custodians’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians’ actions do 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 30th Day of January, 2015

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 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Cynthia Zirkle¹
Complainant**

GRC Complaint No. 2014-212

v.

**Fairfield Township (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Hard copy via pickup of a list of businesses in Fairfield Township (“Township”).

Custodian of Record: Linda Gonzales³

Request Received by Custodian: May 2, 2014

Response Made by Custodian: None

GRC Complaint Received: May 27, 2014

Background

November 18, 2014 Council Meeting:

At its November 18, 2014 public meeting, the 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, found 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 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. In the absence of any evidence that the requested record is exempt, the Custodian may have unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must

¹ No legal representation listed on record.

² No legal representation listed on record.

³ In the Denial of Access Complaint, the Complainant named Geneva Griffin as the Custodian of Record. The subsequent custodian was Carla Smith, who has since been replaced by Ms. Gonzales.

disclose the requested record to the Complainant or, if no record responsive exists, certify to this fact.

3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 19, 2014, the Council distributed its Interim Order to all parties. On November 26, 2014, the current Custodian requested five (5) additional business days to comply with the Council's Order, which the GRC granted.

On December 5, 2014, the current Custodian responded to the Council's Interim Order. The current Custodian stated that she located two (2) resolutions dated March 18, and July 15 2014 containing business listings, which she provided to the Complainant and GRC simultaneously. However, the current Custodian did not include a valid certification confirming compliance. Thus, on December 8, 2014, the GRC advised the current Custodian that her certification was not valid because it did not contain the language required by R. 1:4-4. The GRC requested that the current Custodian resubmit her certified confirmation of compliance, which she did later that day.

Analysis

Compliance

At its November 18, 2014 meeting, the Council ordered the Custodian to disclose the responsive business list or certify to the non-existence of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 19, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 26, 2014.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On November 26, 2014, the fifth (5th) business day after receipt of the Council's Order, the current Custodian requested five (5) additional business days to comply with the Council's Order, which the GRC granted. On December 5, 2014, the current Custodian responded providing responsive records to the Complainant and GRC; however, her legal certification was invalid. Thereafter, on December 8, 2014 the current Custodian corrected this deficiency, but after the deadline to comply had expired.

Therefore, the current Custodian only partially complied with the Council's November 18, 2014 Interim Order because although she responded within the extended time frame providing responsive records to the Complainant, she failed to simultaneously provide valid certified confirmation of compliance to the Executive Director, as explicitly directed in the Order, until after the expiration of the extended time frame.

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 original Custodian failed to respond to the Complainant's OPRA request, the interim Custodian failed to submit an SOI and the current Custodian only partially complied with the Council's November 18, 2014 Interim Order, the current Custodian did provide responsive records to the Complainant on December 5, 2014. Thus, the evidence of record does not indicate that any of the Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians' actions do not rise to

the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian only partially complied with the Council's November 18, 2014 Interim Order because although she responded within the extended time frame providing responsive records to the Complainant, she failed to simultaneously provide valid certified confirmation of compliance to the Executive Director, as explicitly directed in the Order, until after the expiration of the extended time frame.
2. Although the original Custodian failed to respond to the Complainant's OPRA request, the interim Custodian failed to submit a Statement of Information and the current Custodian only partially complied with the Council's November 18, 2014 Interim Order, the current Custodian did provide responsive records to the Complainant on December 5, 2014. Thus, the evidence of record does not indicate that any of the Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodians' actions do 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: Frank F. Caruso
Communications Specialist/Resource Manager

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

January 20, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 18, 2014 Government Records Council Meeting

Cynthia Zirkle
Complainant

Complaint No. 2014-212

v.

Fairfield Township (Cumberland)
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. 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 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. In the absence of any evidence that the requested record is exempt, the Custodian may have unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must disclose the requested record to the Complainant or, if no record responsive exists, certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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 19, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Cynthia Zirkle¹
Complainant**

GRC Complaint No. 2014-212

v.

**Fairfield Township (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Hard copy via pickup of a list of businesses in Fairfield Township (“Township”).

Custodian of Record: Carla Smith³
Request Received by Custodian: May 2, 2014
Response Made by Custodian: None
GRC Complaint Received: May 27, 2014

Background⁴

Request and Response:

On May 2, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On May 27, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she submitted her request to the Township on May 2, 2014. The Complainant averred that she attempted to contact the Township by phone on May 21, 2014. The Complainant argued that she received no response as of May 22, 2014.

Statement of Information

On June 11, 2014, the GRC sent the Custodian a request for a Statement of Information

¹ No legal representation listed on record.

² No legal representation listed on record.

³ In the Denial of Access Complaint, the Complainant named Genena Griffin as the Custodian of Record.

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.

("SOI"). On June 12, 2014, the Custodian acknowledged receipt of the SOI request and advised that she would respond soon. On June 23, 2014, via letter, the GRC advised the Custodian of her failure to timely submit an SOI and provided her with three (3) additional business days to respond. The Custodian failed to submit an SOI to the GRC.

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).⁵ 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).

The Complainant alleged that the Custodian failed to respond to her OPRA request in a timely manner. The Custodian failed to submit an SOI refuting that she failed to respond.

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 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.

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.

In this matter, the Custodian failed to respond to the OPRA request. Additionally, the Custodian failed to submit an SOI even after acknowledging receipt of the GRC's request for same.

Therefore, in the absence of any evidence that the requested record is exempt, the Custodian may have unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must

⁵ 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.

disclose the requested record to the Complainant or, if no record responsive exists, certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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 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. In the absence of any evidence that the requested record is exempt, the Custodian may have unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must disclose the requested record to the Complainant or, if no record responsive exists, certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

November 10, 2014