



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2015 Government Records Council Meeting

Matthew Elkhill
Complainant

Complaint No. 2014-409

v.

Township of Edison (Middlesex)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 2015 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 in writing 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. Because the Custodian forwarded the Complainant’s OPRA request to the proper custodian of the requested records, and said records were made available, no unlawful denial of access occurred.
3. The Custodian failed to bear her burden of proof that she timely responded to the Complainant’s OPRA request, which resulted in a “deemed” denial of the request. However, she certified that the requested records were ultimately made available to the Complainant. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were 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 29th Day of September, 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: October 5, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Matthew Elkhill¹
Complainant**

GRC Complaint No. 2014-409

v.

**Township of Edison (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of the Complainant's paperwork from when he went to register under Megan's Law, from September 1, 2004, to January 1, 2014.

Custodian of Record: Michelle Kasperski (Assistant to Municipal Clerk)

Request Received by Custodian: May 12, 2014

Response Made by Custodian: None

GRC Complaint Received: December 2, 2014

Background³

Request and Response:

On May 11, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian did not respond in writing.

Denial of Access Complaint:

On December 1, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was referred to "Middlesex County agencies," prior to calling the New Brunswick office of the Middlesex County Prosecutor's Office, who he alleged referred him back to Edison Township. He stated that he faxed and mailed his request to Edison Township's municipal clerk. The Complainant made no other legal arguments regarding the alleged denial of access by Edison Township.

¹No legal representation listed on record.

²Represented by Ted DelGuercio, III, Esq.

³The 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 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 12, 2014. The Custodian averred that she then forwarded the request to the Police Records Unit on that same day. On May 13, 2014, the department informed the Custodian that they did not maintain the requested records. The Custodian then forwarded the request via e-mail to the Police Chief and Deputy Police Chief.

On May 21, 2014, the seventh business day following receipt of the request, the Custodian e-mailed the Chief and Deputy Chief to inquire as to the status of the request. The Custodian certified that she was forwarded an e-mail chain of correspondence from Police Administration, which stated in relevant part that the Middlesex County Prosecutor’s Office was handling the request, as they maintained the documents. The Custodian certified that she did not reply in writing to the Complainant concerning the request.

The Custodian stated that after receiving the Complainant’s Denial of Access Complaint on December 12, 2014, she spoke with Kelly Pollack of the Middlesex County Prosecutor’s Office. According to the Custodian, Ms. Pollack stated that she contacted the Complainant on May 16, 2014, seeking clarification as to his request. However, she reported that she had “never heard back” from him. The Custodian stated that neither she nor the Middlesex County Prosecutor’s Office “heard from” the Complainant in the time period between the request and the filing of the complaint. The Custodian further stated that she spoke to Ms. Pollack on December 19, 2014, who said that she had spoken to the Complainant about picking up the requested documents.

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).

Here, the Complainant asserted that he submitted an OPRA request on May 11, 2014, but received no response from the Custodian regarding his request. In fact, the Custodian’s own certification acknowledges that no written response was issued. Indeed, the Custodian pointed to

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.

an e-mail which determined that another agency may have possessed the requested records. While it appears that the other agency, the Middlesex County Prosecutor's Office, attempted to contact the Complainant regarding the request, the other agency's efforts in the instant matter do not absolve the Custodian from her failure to respond within the statutorily mandated seven-day period, which resulted in a deemed denial under OPRA.

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.

OPRA requires a public agency's officers or employees to forward an OPRA request to the proper custodian or to direct the requester to the custodian. N.J.S.A. 47:1A-5.h. In the instant matter, the Complainant sought copies of his past paperwork concerning registration under Megan's Law, from September 1, 2004, to January 1, 2014. The Custodian certified that, while she did not respond to the request, it was eventually forwarded to the appropriate agency, the Middlesex County Prosecutor's Office ("MCPO"), which informed the Custodian that they were handling the request. According to the Custodian's certification, she spoke to an employee of the MCPO, who stated that, following the Complainant's filing of a Denial of Access Complaint, the requested records were made available.

Because the Custodian forwarded the Complainant's OPRA request to the proper custodian of the requested records, and said records were made available, no unlawful denial of access occurred.

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 determining 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, the Custodian failed to bear her burden of proof that she timely responded in writing to the Complainant's OPRA request, which resulted in a "deemed" denial of the request. However, she certified that the requested records were ultimately made available to the Complainant. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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.

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 in writing 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).
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of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015