



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-126

v.

Township of Greenwich (Warren)
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss the complaint because Complainant’s Counsel, based on a settlement agreement, withdrew the instant complaint in a letter to the Honorable Kimberly A. Moss, Administrative Law Judge, dated October 3, 2018. Therefore, no further adjudication is required.

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 October, 2018

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 1, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-126

v.

**Township of Greenwich (Warren)²
Custodial Agency**

Records Relevant to Complaint:

1. A copy of all 2013 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
2. A copy of all 2014 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
3. A copy of all January 1, 2015 through April 20, 2015 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.

Custodian of Record: Kimberly D. Viscomi
Request Received by Custodian: April 21, 2015
Response Made by Custodian: None
GRC Complaint Received: May 4, 2015

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2018 *In Camera* Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply with the Council's December 15, 2015 Interim Order. Specifically, the Custodian timely responded within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director. However, she failed to provide all records required for the *in camera* review.

¹ Represented by John A. Bermingham, Jr., Esq. (Mt. Bethel, PA). Also represented by Walter M. Luers, Esq. of the Law Office of Walter Luers (Clinton, NJ). Mr. Luers entered his appearance to the Office of Administrative Law on April 30, 2018.

² Represented by Heather Pierce, Esq. of Maraziti, Falcon, LLP. (Short Hills, NJ). Previously represented by Francesco Taddeo, Esq. (Somerville, NJ).

The Custodian also failed to provide the appropriate number of copies required by the Order for those records she did submit. Further, the Custodian failed to provide a complete document index.

2. The GRC is unable to determine whether the Custodian lawfully redacted the responsive records. Specifically, the Custodian failed to provide copies of the unredacted 2013 invoices, failed to provide the required number of copies for the other invoices, and failed to provide an adequate document index. As such, this complaint should be referred to the Office of Administrative Law to perform an *in camera* review of the responsive records and determine whether the Custodian unlawfully denied access to the requested records. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012). If so, the Office of Administrative Law should order disclosure of those records, in part or whole, where the redactions were not lawful. Further, for adjudicatory ease and if applicable, the Office of Administrative Law should: 1) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11; and 2) determine whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.

Procedural History:

On February 1, 2018, the Council distributed its Interim Order to all parties. On April 5, 2018, the Government Records Council (“GRC”) transmitted the complaint to the Office of Administrative Law (“OAL”). On October 3, 2018, Complainant’s Counsel e-mailed a letter to the Honorable Kimberly A. Moss, Administrative Law Judge, withdrawing the instant complaint based on a settlement agreement between the parties. On October 16, 2018, OAL returned the complete file jacket to the GRC labeled “Withdrawn.”

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council dismiss the complaint because Complainant’s Counsel, based on a settlement agreement, withdrew the instant complaint in a letter to the Honorable Kimberly A. Moss, Administrative Law Judge, dated October 3, 2018. Therefore, no further adjudication is required.

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

October 23, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-126

v.

Township of Greenwich (Warren)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s December 15, 2015 Interim Order. Specifically, the Custodian timely responded within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director. However, she failed to provide all records required for the *in camera* review. The Custodian also failed to provide the appropriate number of copies required by the Order for those records she did submit. Further, the Custodian failed to provide a complete document index.
2. The GRC is unable to determine whether the Custodian lawfully redacted the responsive records. Specifically, the Custodian failed to provide copies of the unredacted 2013 invoices, failed to provide the required number of copies for the other invoices, and failed to provide an adequate document index. As such, this complaint should be referred to the Office of Administrative Law to perform an *in camera* review of the responsive records and determine whether the Custodian unlawfully denied access to the requested records. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012). If so, the Office of Administrative Law should order disclosure of those records, in part or whole, where the redactions were not lawful. Further, for adjudicatory ease and if applicable, the Office of Administrative Law should: 1) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11; and 2) determine whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.



Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2018

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 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-126

v.

**Township of Greenwich (Warren)²
Custodial Agency**

Records Relevant to Complaint:

1. A copy of all 2013 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
2. A copy of all 2014 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
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Custodian of Record: Kimberly D. Viscomi
Request Received by Custodian: April 21, 2015
Response Made by Custodian: None
GRC Complaint Received: May 4, 2015

Records Submitted for *In Camera* Examination: Unredacted copies of 2014, and January 1, thru April 20, 2015 purchase orders, invoices, and attachments for Francesco Taddeo, Esq.³

Background

December 15, 2015 Council Meeting:

At its December 15, 2015 public meeting, the Council considered the December 8, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

¹ Represented by John A. Bermingham, Jr., Esq. (Mt. Bethel, PA).

² Represented by Heather Pierce, Esq. of Maraziti, Falcon, LLP. (Short Hills, NJ). Previously represented by Francesco Taddeo, Esq. (Somerville, NJ).

³ The Custodian did not provide any 2013 invoices. The Custodian also provided for *in camera* review records that came into existence after the date of the OPRA request.

1. The Custodian's failure to respond immediately to the Complainant's OPRA request resulted in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of 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. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 16, 2015, the Council distributed its Interim Order to all parties on. On December 22, 2015, Custodian's Counsel sought a five (5) business day extension of time to comply with the Council's Order. On the same day, the Government Records Council ("GRC") granted an extension until January 4, 2016.

On January 4, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that she was providing for an *in camera* review redacted and unredacted

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

copies of the responsive records and a “document index.” The Custodian further asserted that her initial untimely response to the Complainant’s OPRA request did not amount to a knowing and willful violation. The Custodian asserted that this claim is supported by the number of duties she maintains at the Township, staffing levels, and her reliance on prior Custodian’s Counsel to review and redact the responsive records.

On March 24, 2016, the GRC e-mailed the Custodian advising that it received only seven (7) copies of the responsive records instead of the nine (9) copies ordered. The GRC reiterated its Order and requested two (2) additional copies of the responsive records. On the same day, the Custodian responded advising that she would send the additional copies to the GRC “early next week.” The GRC has no record of receiving the additional copies.

Analysis

Compliance

At its December 15, 2015 meeting, the Council ordered the Custodian to provide nine (9) copies of the redacted and unredacted records at issue here for an *in camera* review with an accompanying “document index.” Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On December 16, 2015, 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 December 23, 2015.

On December 22, 2015, the fourth (4th) business day after receipt of the Council’s Order, Custodian’s Counsel sought a five (5) business day extension to comply with the Order, which the GRC granted through January 4, 2016. On January 4, 2016, the Custodian responded to the Council’s Order. However, the response was significantly insufficient.⁷ Specifically, the Custodian did not provide any copies of the 2013 invoices, unredacted or otherwise. Further, the Custodian provided only one (1) copy of the redacted 2014 invoices and six (6) unredacted copies. The Custodian also did not provide redacted copies of the 2015 invoices (through April 2015), but provided fourteen (14) unredacted copies. The Custodian also provided multiple copies of invoices that came into existence after the Complainant’s OPRA request and are not considered responsive records in this complaint. See Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-58 (January 2015); Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Finally, the document index provided contained only three (3) entries: two (2) of those entries correlate to invoices not responsive to the Complainant’s OPRA request. In addition, the GRC has no evidence of receiving additional copies of the *in camera* documents from the Custodian as requested in March 2016. It should be noted that the Custodian did simultaneously provide certified confirmation of compliance to the Executive Director. Based on all of the above, the Custodian clearly failed to comply with the Council’s Order.

⁷ The GRC notes that Custodian’s Counsel e-mailed to the GRC unredacted copies of 2014 and 2015 invoices. However, the GRC’s regulations provide that “[n]either the Council, nor anyone else authorized to inspect the documents, shall make copies of same.” N.J.A.C. 5:105-2.8(e). Thus, the GRC did not print copies from Counsel’s e-mail attachments in accordance with its regulations.

Therefore, the Custodian failed to comply with the Council's December 15, 2015 Interim Order. Specifically, the Custodian timely responded within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director. However, she failed to provide all records required for the *in camera* review. The Custodian also failed to provide the appropriate number of copies required by the Order for those records she did submit. Further, the Custodian failed to provide an adequate document index.

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. N.J.S.A. 47:1A-6.

In prior complaints where a custodian failed to comply with the Council's Interim Order, the GRC has referred them to the Office of Administrative Law ("OAL") for fact-finding hearings and *in camera* reviews. Notably, in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012), the Council required the custodian to submit records for an *in camera* review. However, upon reviewing the custodian's compliance, it was determined that the document index was insufficient. Looking to its prior decision in Hyman v. City of Jersey City (Hudson), GRC Complaint No. 2007-118 (Interim Order dated December 18, 2012), the Council referred the complaint to the OAL to conduct the *in camera* review. The Council also requested that the OAL determine the knowing and willful and prevailing party issues for administrative efficacy. *See also* Katon (O.B.O. Muslim Advocates) v. NJ Dep't of Law & Pub. Safety, GRC Complaint No. 2012-267 (Interim Order dated April 26, 2016) (referring the complaint to the OAL because the Council unable to determine whether the custodian lawfully denied access to responsive records due to the lack of a sufficient document index); Scheeler, Jr. v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-230 (Interim Order dated July 28, 2015) (the custodian submitted multiple e-mails with no document index).

Here, the Custodian not only failed to provide an adequate document index, but she also failed to provide unredacted 2013 invoices. Further, the Custodian did not provide enough copies of the other invoices to compile a single complete copy of the responsive records from which the Council could conduct its *in camera* review. Simply put, the Custodian's failure to comply with the Council's Order rendered the GRC unable to perform an *in camera* review to determine whether an unlawful denial of access occurred. While this complaint shares similarities with Carter, GRC 2011-73, the deficiencies here actually further support a conclusion that the OAL's assistance is required. Based on this, the GRC is satisfied that this complaint should be referred to the OAL for further review.

Accordingly, the GRC is unable to determine whether the Custodian lawfully redacted the responsive records. Specifically, the Custodian failed to provide copies of the unredacted 2013 invoices, failed to provide the required number of copies for the other invoices, and failed to provide an adequate document index. As such, this complaint should be referred to the OAL to

perform an *in camera* review of the responsive records and determine whether the Custodian unlawfully denied access to the requested records. Carter, GRC 2011-73. If so, the OAL should order disclosure of those records, in part or whole, where the redactions were not lawful. Further, for adjudicatory ease and if applicable, the OAL should: 1) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11; and 2) determine whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's December 15, 2015 Interim Order. Specifically, the Custodian timely responded within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director. However, she failed to provide all records required for the *in camera* review. The Custodian also failed to provide the appropriate number of copies required by the Order for those records she did submit. Further, the Custodian failed to provide a complete document index.
2. The GRC is unable to determine whether the Custodian lawfully redacted the responsive records. Specifically, the Custodian failed to provide copies of the unredacted 2013 invoices, failed to provide the required number of copies for the other invoices, and failed to provide an adequate document index. As such, this complaint should be referred to the Office of Administrative Law to perform an *in camera* review of the responsive records and determine whether the Custodian unlawfully denied access to the requested records. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order dated September 25, 2012). If so, the Office of Administrative Law should order disclosure of those records, in part or whole, where the redactions were not lawful. Further, for adjudicatory ease and if applicable, the Office of Administrative Law should: 1) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11; and 2) determine whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.

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

January 23, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 15, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-126

v.

Township of Greenwich (Warren)
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 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’s failure to respond immediately to the Complainant’s OPRA request resulted in a violation of OPRA’s immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of 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. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian’s assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA’s exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.



N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 15th Day of December, 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: December 16, 2015

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-126

v.

**Township of Greenwich (Warren)²
Custodial Agency**

Records Relevant to Complaint:

- 1) A copy of all 2013 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
- 2) A copy of all 2014 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
- 3) A copy of all January 1, 2015-April 20, 2015 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.

Custodian of Record: Kimberly D. Viscomi
Request Received by Custodian: April 21, 2015
Response Made by Custodian: None
GRC Complaint Received: May 4, 2015

Background³

Request and Response:

On April 21, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant received no written response to the request within seven (7) business days.

Denial of Access Complaint:

On May 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian did not grant access, deny access, seek clarification, or request an extension of time within OPRA’s

¹ Represented by John A. Birmingham, Jr., Esq. (Mt. Bethel, PA).

² Represented by Francesco Taddeo, Esq.

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.

statutorily mandated seven (7) business days. The Complainant argued that the “preponderance of all credible evidence” suggested that the Custodian did not deny the Complainant access to the requested records carelessly but rather “knowingly, purposefully, and willfully.” The Complainant argued that the GRC should: 1) find that the Custodian knowingly and willfully violated OPRA and unreasonably denied the Complainant access to the requested records, thereby warranting the assessment of a civil penalty; 2) order the release of all responsive records relevant to the Complainant’s validly submitted OPRA request; 3) find that the Complainant is a prevailing party; 4) find that the Complainant is awarded his attorney’s fees; 4) find that the instant complaint is a “deemed denial”; and 5) find further relief as deemed proper.

Statement of Information:

On May 29, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 21, 2015. The Custodian certified that she ultimately responded to the request on May 29, 2015, by providing all records to the Complainant, with appropriate redactions to the invoices, citing attorney-client privileged and work product information. N.J.S.A. 47:1A-1.1. The Custodian asserted no other legal arguments.

Additional Submissions:

On May 28, 2015, the Complainant filed an additional submission with the GRC, reasserting the arguments proffered in the Denial of Access Complaint and additionally stating that the invoices sought were “immediate access records,” pursuant to N.J.S.A. 47:1A-5e.

On June 10, 2015, the Complainant filed an additional submission, objecting to the Custodian’s assertion of “blanket privileges” for redactions. The Complainant further argued that the Custodian failed to identify which statutory exemptions were being claimed for each redaction and failed to “explain how disclosure would damage the interests protected by the claimed exemption.” The Complainant argued that in light of the foregoing facts, the GRC must conduct an *in camera* review to address the veracity of every redaction. The Complainant additionally argued that the attorney-client privilege cited by the Custodian is not absolute, pursuant to In re Kozlov, 79 N.J. 232 (1979); Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356 (1995); Kinsella v. Kinsella, 150 N.J. 276 (1997); and Keddie v. Rutgers, State University, 148 N.J. 36 (1997).

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).

Furthermore, OPRA contains a separate response time for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). When immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

Here, the Complainant's April 21, 2015 request sought copies of "purchase orders, invoices, and attachments." Although the Complainant requested a type of immediate access records listed at N.J.S.A. 47:1A-5(e), the Custodian did not respond until May 29, 2015. Additionally, the Custodian's acknowledges in her own certification that she ultimately responded to the request on May 29, 2015, by providing all requested records, with redactions, to the Complainant.

Accordingly, the Custodian's failure to respond immediately to the Complainant's OPRA request resulted in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178. Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of 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 Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The court stated that:

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.

OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, it also provides that the GRC "may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed." N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the court stated that:

We hold only that GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian has argued that the responsive attorney invoices provided to the Complainant were redacted pursuant to N.J.S.A. 47:1A-1.1, as attorney-client privileged and work product information. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party 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's failure to respond immediately to the Complainant's OPRA request resulted in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of 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. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015