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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

January 26, 2016 Government Records Council Meeting

Robert Steelman
Complainant

Complaint No. 2015-140

v.

City of Summit Parking Services Agency (Union)
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 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 written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep’t, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. 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 timely 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).
3. The Custodian’s denial of access was lawful. Because the Custodian certified in her Statement of Information that the requested 2014 Annual Report was in draft form at the time of the Complainant’s OPRA request and in the process of being finalized, the record responsive to the Complainant’s OPRA request is therefore deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative, and deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1.
4. Although the Custodian did not respond to the Complainant’s request within the seven (7) business days required by OPRA, she did ultimately reply on the third business day after the deadline, denying access as the requested report was still in draft form. She additionally certified that after further review of the Complainant’s request, she determined there were certain records containing information the



Complainant may be “interested in reviewing.” The Custodian averred that she provided the additional records to the Complainant, although not explicitly requested, in order to comply with the general spirit of OPRA to maximize public knowledge about public affairs. 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 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 26th Day of January, 2016

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: January 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 26, 2016 Council Meeting**

**Robert Steelman¹
Complainant**

GRC Complaint No. 2015-140

v.

**City of Summit Parking Services Agency (Union)²
Custodial Agency**

Records Relevant to Complaint: Copy of the Parking Services Agency's 2014 Annual Report for Facility Revenue.

Custodian of Record: Rita McNany

Request Received by Custodian: May 4, 2015

Response Made by Custodian: May 18, 2015

GRC Complaint Received: May 20, 2015

Background³

Request and Response:

On May 4, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. In the request, the Complainant sought a .pdf copy to be sent via e-mail but also stated that he could pick up a copy from the agency. The City Clerk wrote to the Complainant on May 4, 2015, advising him of the agency's receipt of his OPRA request and informing him that the request was forwarded to the Custodian, the Manager of the Parking Services Agency (PSA), for processing. The Complainant wrote to the Custodian on May 16, 2015, seeking an update as to the status of the request.

The Custodian wrote to the Complainant on May 18, 2015, apologizing for the "unintentional" delay, stating she was "simply unable" to answer the Complainant's e-mail until that day. The Custodian wrote that when she "researched the 2014 annual report, what I found was that it was started but never finished." She noted that the time period of the report was "during the time of my brother's failing health and his passing away. This is not an excuse but simple reality." She noted that "it is not a normal course of action for us to have matters not completed" and that while there was a 2013 annual report, 2014 was never finalized. She

¹ No legal representation listed on record.

² Represented by Robert L. Ghelli, Esq. (Newark, NJ).

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.

Robert S. Steelman v. City of Summit Parking Services Agency (Union), 2015-140 – Findings and Recommendations of the Executive Director

informed the Complainant that the agency was working to complete the 2014 report “but it will take some time” and that “as soon as it was completed, you will receive a copy of the report.” The Complainant replied to this e-mail that same day, stating that “the OPRA request has guidelines for a response” and that if there was no response “then the request is taken to be denied.” The Complainant additionally asked whether he needed to make an additional OPRA request for the 2013 report and requested a date as to when the 2014 report would be finalized.

The Custodian responded later that same day, advising the Complainant to re-read her earlier e-mail wherein she stated that the Complainant would receive a copy of the 2014 report “as soon as it is completed” and stating that he needed to submit an additional OPRA request for the 2013 report.

Denial of Access Complaint:

On May 19, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s explanation for denying the request was “puzzling” and questioned “how is it possible to have actual budget numbers without completing the source report?” The Complainant made no additional legal arguments.

Statement of Information:

On June 5, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 4, 2015. The Custodian noted that attached to the request was a document entitled “City of Summit – Parking Services Agency 2015 Anticipated Revenues,” which contained footnote references to the 2014 report that was the subject of the request. She averred that she responded to the request on May 18, 2015. The Custodian advised the Complainant that the 2014 Annual Report was started but never finished and was therefore unavailable at that time. She clarified that the references to the 2014 Annual Report, contained in the footnotes in the 2015 Anticipated Revenues Report, were included because of intent to finalize the 2014 Annual Report, which had yet to occur. Custodian’s Counsel argued that the Complaint should be dismissed, as the 2014 Annual Report is yet to be completed. Counsel additionally argued that the Custodian correctly denied access to the requested record as the unfinished report is deliberative material protected from disclosure, pursuant to N.J.S.A. 47:1A-1.1’s exemption for “inter-agency or intra-agency advisory, consultative or deliberative material,”; Ciesla v. New Jersey Dept. of Health and Senior Services, 429 N.J. Super. 127, 133 (App. Div. 2012); and the Council’s previous decision in Cargill v. New Jersey Dept. of Educ., GRC Complaint No. 2009-256 (March 2011).

The Custodian further noted that upon further review of the request, she determined that additional records (not identified in the May 4 request or a subsequent, separate May 18 request), contained information “the Complainant would be interested in reviewing.” She averred that she therefore provided the Complainant with spreadsheets generated by the PSA, detailing facility revenue information on a monthly and year-to-date basis for the years 2013 and 2014. The Custodian certified that these additional records were provided to the Complainant in order to meet the general purpose of OPRA to “maximize public knowledge about public affairs in order

to ensure an informed citizenry and to minimize the evils inherent to a secluded process.” See Ciesla, at 136-137.

The Custodian admitted that her May 18, 2015 response to the May 4, 2015 request was three (3) business days beyond the seven (7) days mandated by OPRA. She stated the delay in response was “unintentional.” The Custodian averred that the requested 2014 report had yet to be completed and would be forwarded to the Complainant once the requested report is finished.

Additional Party Submissions

On June 8, 2015, the Complainant wrote to the GRC, questioning the Custodian’s claim that the delay was “unintentional.” The Complainant additionally speculated that the 2014 report is, in fact, available and alleged that the report “was distributed to members of Summit’s Common Council.” However, the Complainant provided no other evidence supporting his assertion.

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 Custodian received the request on May 4, 2015, necessitating a response or request for extension no later than May 13, 2015. Instead, the Custodian admitted that she did not respond to the Complainant until May 18, 2015, three (3) business days after the required date.

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 timely 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.

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.

Robert S. Steelman v. City of Summit Parking Services Agency (Union), 2015-140 – Findings and Recommendations of the Executive Director

Sufficiency of Response

In Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated "...the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, "...N.J.S.A. 47:1A-5(g) provides that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Custodian's May 18, 2015 response apologized for the delay and explained that her research led her to discover that the request 2014 annual report was never completed. The Custodian went on to repeat this fact throughout the response and stated that the agency was working to finish the requested report, which would be provided to the Complainant upon completion. In her response, the Custodian failed to state explicitly that the request was denied or provide a specific lawful basis for denying the request record. Although there are numerous exemptions, as well as exceptions, set forth in N.J.S.A. 47:1A-1.1 et seq., the Custodian did not cite to any specific provision of OPRA, another State statute, executive order, or regulation as authority for lawfully denying the Complainant's request.

Therefore, the Custodian's written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also Morris*, GRC 2007-160 and Rader, GRC 2007-239.

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 excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In Piszar v. New Jersey Dept. of Environmental Protection, GRC Complaint No. 2010-176 (July 2011), the Complainant requested a copy of a 2009-2010 annual report due to the Legislature. The Custodian in that case denied the request, as the report was in draft form and not finalized at the time of the request. The Custodian additionally certified that the agency was actively working on the responsive record at that time. The Council ultimately determined that

the requested report was in draft form at the time of the Complainant's request and that the responsive record was in fact deliberative in nature, thus exempt from disclosure under OPRA as ACD material, pursuant to N.J.S.A. 47:1A-1.1.

Similarly to the situation in Piszar, the Custodian certified that at the time of the request, and the later filing of the Denial of Access complaint, the 2014 annual report was still in draft form and yet to be finalized. The Custodian additionally noted that footnotes referring to the 2014 report, contained in a document from 2015, support this fact, as the report is in existence but still in draft form and will ultimately be finalized. The Custodian further certified that when the 2014 report is finalized, it will be disclosed to the Complainant. The Complainant provided no evidence to refute the Custodian's certification.

The record shows that the Custodian's denial of access was lawful. Because the Custodian certified in her Statement of Information that the requested 2014 Annual Report was in draft form at the time of the Complainant's OPRA request and in the process of being finalized, the record responsive to the Complainant's OPRA request is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative, and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

Knowing and Willfull

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 did not respond to the Complainant's request within the seven (7) business days required by OPRA, she did ultimately reply on the third business day after the deadline, denying access as the requested report was still in draft form. She additionally certified that after further review of the Complainant's request, she determined there were certain records containing information the Complainant may be "interested in reviewing." The Custodian averred that she provided the additional records to the Complainant, although not explicitly requested, in order to comply with the general spirit of OPRA to maximize public knowledge about public affairs. 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 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 written response is insufficient because the Custodian failed to provide a specific lawful basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008) and Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. 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 timely 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).
3. The Custodian's denial of access was lawful. Because the Custodian certified in her Statement of Information that the requested 2014 Annual Report was in draft form at the time of the Complainant's OPRA request and in the process of being finalized, the record responsive to the Complainant's OPRA request is therefore deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative, and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.
4. Although the Custodian did not respond to the Complainant's request within the seven (7) business days required by OPRA, she did ultimately reply on the third business day after the deadline, denying access as the requested report was still in draft form. She additionally certified that after further review of the Complainant's request, she determined there were certain records containing information the Complainant may be "interested in reviewing." The Custodian averred that she provided the additional records to the Complainant, although not explicitly requested,

in order to comply with the general spirit of OPRA to maximize public knowledge about public affairs. 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 unreasonable denial of access under the totality of the circumstances.

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

January 19, 2016