



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

June 26, 2018 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2015-178

v.

Greenwich Township (Warren)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 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 this complaint because the Complainant notified the GRC by e-mail dated May 24, 2018 of his intention to withdraw the complaint. 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 26th Day of June, 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: June 29, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

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

GRC Complaint No. 2015-178

v.

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

Records Relevant to Complaint: Copies of the following:

1. All OPRA requests made in 2014 and 2015 – if any of those requests were denied, please also provide the letter of denial.
2. The résumé of Deputy Chief Gerard Skelton as well as all certifications.
3. The Township salary ordinance.

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: Unknown
Response Made by Custodian: June 12, 2015
GRC Complaint Received: June 15, 2015

Background

July 26, 2016 Council Meeting:

At its July 26, 2016 public meeting, the Council considered the July 19, 2016 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 as edited. The Council, therefore, found that:

1. The Complainant in the instant matter asserted that the Custodian did not timely respond to part of his request and never responded at all with respect to other items in the request. Moreover, the Custodian offers no evidence to refute the Complainant's assertion. Therefore, the Custodian has not borne her burden of proof that she timely responded in writing, which results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).

¹ No legal representation listed on record.

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

2. The Custodian did not comply with the GRC's initial request for a Statement of Information. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting from the Custodian a completed SOI within three (3) business days of receipt. The GRC has yet to receive a completed SOI from either the Custodian or her Counsel. The Custodian's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
3. Based on the "deemed" denial and the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

Procedural History:

On July 27, 2016, the Council distributed its Interim Order to all parties. On May 24, 2018, the Complainant withdrew this complaint in writing via e-mail to the Government Records Council ("GRC").

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council dismiss this complaint because the Complainant notified the GRC by e-mail dated May 24, 2018 of his intention to withdraw the complaint. Therefore, no further adjudication is required.

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

June 19, 2018



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 26, 2016 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2015-178

v.

Greenwich Township (Warren)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to reject the entirety of said findings and recommendations. The Council sent the complaint back to staff for additional review. The Council, therefore, rejected the following conclusions:

1. The Complainant in the instant matter asserted that the Custodian did not timely respond to part of his request and never responded at all with respect to other items in the request. Moreover, the Custodian offers no evidence to refute the Complainant’s assertion. Therefore, the Custodian has not borne her burden of proof that she timely responded in writing, which results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian did not comply with the GRC’s initial request for a Statement of Information. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting from the Custodian a completed SOI within three (3) business days of receipt. The GRC has yet to receive a completed SOI from either the Custodian or her Counsel. The Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7(b).
3. Based on the “deemed” denial and the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of: (a) whether the Custodian



knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 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: July 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2015-178

v.

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

Records Relevant to Complaint: Copies of the following:

1. All OPRA requests made in 2014 and 2015 – if any of those requests were denied, please also provide the letter of denial.
2. The résumé of Deputy Chief Gerard Skelton as well as all certifications.
3. The township salary ordinance.

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: Unknown
Response Made by Custodian: June 12, 2015
GRC Complaint Received: June 15, 2015

Background³

Request and Response:

On May 26, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2015, the Custodian responded in writing, providing the OPRA request forms and the most recent payroll register. The Custodian additionally provided a link to the Township’s website, noting that the police department’s budget was located online.

Denial of Access Complaint:

On June 13, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that although the municipal

¹ No legal representation listed on record.

² Represented by Francesco Taddeo, Esq. (Somerville, 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.

budget is online, he could not locate the Police Department's budget.⁴ The Complainant additionally asserted that the Custodian failed to release the résumé and training certifications of Deputy Police Chief Gerard Skelton.

The Complainant argued that his request partially sought access to budgets and payroll information, both of which are subject to immediate release pursuant to N.J.S.A. 47:1A-5(e). The Complainant additionally argued that the other items sought had a statutory deadline of June 5, 2015, and that pursuant to Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), 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. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

The Complainant additionally argued that his request for the résumé of Deputy Police Chief Skelton was valid pursuant to Executive Order 26 (McGreevey), which provides that "the resumes of successful candidates shall be disclosed once the successful candidate is hired." The Complainant further noted that his request for the training certifications of the Deputy Police Chief was valid pursuant to N.J.S.A. 47:1A-10, which states "data contained in information which disclose conformity with specific experiential, educational, or medical qualifications required for government employment or for receipt of a public pension, but not including any detail medical or psychological information, shall be a government record."

The Complainant requested that the GRC find that the Custodian violated OPRA for failing to release an immediate release request immediately, failing to respond to a request within the statutory time frame, and unlawfully denying records. He furthermore requested the GRC to order the release of the requested records "if the Custodian fails to release them by the time the GRC requests the Custodian's Statement of Information."

Statement of Information:

On June 26, 2015, the GRC requested a completed Statement of Information ("SOI") from the Custodian. The Custodian failed to comply with the GRC's initial request for a Statement of Information. After failing to respond within the provided five (5) business days, the GRC sent a "No Defense" letter to the Custodian on July 24, 2015, requesting a completed SOI within three (3) business days of receipt. To date, the GRC has not received a response from either the Custodian or Mr. Taddeo, the Custodian's counsel of record.

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

⁴ The Complainant did not explicitly request the Police Department's budget in his OPRA request.

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).

Additionally, OPRA provides that:

If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.

N.J.S.A. 47:1A-5(i).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request, seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated . . . the Custodian violated N.J.S.A. 47:1A-5(i), resulting in a "deemed" denial of access to the records.

Id.

Unlike in Kohn, where the Custodian timely responded to the initial OPRA request, the Complainant in the instant matter asserted that the Custodian did not timely respond to part of his request and never responded at all with respect to other items in the request. Moreover, the Custodian offers no evidence to refute the Complainant's assertion. Therefore, the Custodian has not borne her burden of proof that she timely responded in writing, which results in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

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.

Failure to Submit SOI

In crafting OPRA, the Legislature defined the GRC's authority, which includes a statutory mandate to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." N.J.S.A. 47:1A-7(b). To carry out those duties, the GRC promulgated regulations requiring that custodians "shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]" N.J.A.C. 5:105-2.4(a). The GRC further requires that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

N.J.A.C. 5:105-2.4(f).

Finally, the GRC's regulations provide that "[a] custodian's failure to submit a completed and signed SOI . . . may result in the Council's issuing a decision in favor of the complainant." N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a).

In the instant matter, the Custodian did not comply with the GRC's initial request for a Statement of Information. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a "No Defense" letter and requesting from the Custodian a completed SOI within three (3) business days of receipt. The GRC has yet to receive a completed SOI from either the Custodian or her Counsel. The Custodian's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian..." N.J.S.A. 47:1A-7(b).

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.

Here, the Complainant asserts that he received no response from the Custodian regarding part of his OPRA request and an untimely response with respect to certain items that are

considered “immediate access” records under OPRA. The Custodian’s failure to respond results in a “deemed” denial of the OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). In addition, the Custodian failed to submit an SOI to the GRC, despite repeated attempts to contact her. Because the Custodian refused to complete the GRC’s required SOI, the GRC does not have an unequivocal record on which to rely in adjudicating this complaint.

Therefore, based on the “deemed” denial and the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant in the instant matter asserted that the Custodian did not timely respond to part of his request and never responded at all with respect to other items in the request. Moreover, the Custodian offers no evidence to refute the Complainant’s assertion. Therefore, the Custodian has not borne her burden of proof that she timely responded in writing, which results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian did not comply with the GRC’s initial request for a Statement of Information. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting from the Custodian a completed SOI within three (3) business days of receipt. The GRC has yet to receive a completed SOI from either the Custodian or her Counsel. The Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” N.J.S.A. 47:1A-7(b).
3. Based on the “deemed” denial and the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. As such, this complaint should be referred to the Office of Administrative Law (“OAL”) for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of: (a) whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and (b) whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee.

Prepared By: Husna Kazmir
Staff Attorney

July 19, 2016