



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

Susan Noto
Complainant

v.

Bergen County
Custodian of Record

Complaint No. 2015-245

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 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 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 Custodian has borne his burden of proving that he did not unreasonably deny access to the records requested by the Complainant because the Custodian made the records publicly available by posting them on the Internet, and the evidence of record reveals that the Complainant was able to access the requested records online. N.J.S.A. 47:1A-6. See Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period, resulting in a “deemed” denial of the request, he did respond to the request in writing by seeking clarification on the ninth (9th) business day. Moreover, 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 15th Day of November, 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: November 17, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Susan Noto¹
Complainant**

GRC Complaint No. 2015-245

v.

**Bergen County²
Custodial Agency**

Records Relevant to Complaint: Electronic copies on compact disc (“CD”) or hard drive of recorded document images for the recording date range of September 1, 2014, through May 15, 2015.

Custodian of Record: John S. Hogan
Request Received by Custodian: May 21, 2015³
Response Made by Custodian: June 4, 2015
GRC Complaint Received: July 29, 2015

Background⁴

Request and Response:

On May 21, 2015, the Complainant submitted via e-mail an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 4, 2015, the ninth (9th) business day following receipt of said request, the Custodian’s Counsel responded in writing, informing the Complainant that she failed to identify the records specifically and must do so in order for the Custodian to search for any responsive records.

By e-mail dated June 8, 2015, the Complainant clarified the request by stating that she was requesting the same document images that are available on the County’s online land record search but without the watermark. The Complainant stated that she is seeking “Deed[s], Lis Pendens [notices], Mortgage[s] and Miscellaneous.” The Complainant also narrowed the date range of the request to January 2, 2015, through May 29, 2015.

¹ Represented by Sarah Gordon, Esq. (Seattle, WA).

² Represented by Paul Kaufman, Esq., of Kaufman Semeraro & Leibman (Fort Lee, NJ).

³ Although captioned as an “Open Records Request,” it is clear from the subject line and the content of the e-mail that the Complainant was invoking the provisions of OPRA.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

By letter dated June 10, 2015, the Custodian's Counsel informed the Complainant that by seeking "Miscellaneous" records, the request remains overly broad. The Custodian's Counsel also informed the Complainant she is seeking records already available on the County's online land record search. Counsel informed the Complainant that she is asking the Custodian "to compile...records already available to the public . . . in a format that [the Complainant] desire[s]." The Custodian's Counsel states that Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008) does not require the Custodian to compile documents, but rather, only to produce copies of the records.

On July 13, 2015, the Complainant's Counsel e-mailed the Custodian's Counsel to inform him that "Miscellaneous" is one of seven categories of "Document Type" available for request on the County's website. The Complainant's Counsel stated that, as such, copies of records in the "Miscellaneous" category should be available for disclosure. By letter dated July 15, 2015, the Custodian's Counsel indicated that he would not dispute the "Miscellaneous" category issue; however, he reasserted the Custodian's denial based on the requested records being available online.

The Complainant's Counsel e-mailed the Custodian's Counsel on July 15, 2015. The Complainant's Counsel stated that the Custodian's Counsel accurately restated the request in his June 10, 2015 letter when he wrote that "[the e-mail from the Complainant's Counsel] essentially seeks the Clerk to compile these records already available to the public . . . in a format that [she] desire[s]." Complainant's Counsel asserted that OPRA provides that a custodian must permit access to records in the medium requested, if the agency maintains the record in that medium. Complainant's Counsel stated that because the agency maintains the requested records in electronic form, transferring it to a CD or hard drive is a reasonable request. Complainant's Counsel also states that nowhere in the case cited by the Custodian's Counsel, Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, does it imply that OPRA does not require a custodian to compile documents. The Complainant's Counsel renews her request for disclosure of the records.

On July 21, 2015, the Custodian's Counsel informed the Complainant's Counsel that because the requested records are available for public inspection, the Complainant's request for a specific compilation of the records is denied. The Custodian's Counsel further informed the Complainant's Counsel that "OPRA was never intended to have tax payers incur significant costs in furtherance and for the benefit of private enterprise."

Denial of Access Complaint:

On July 29, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that she submitted the records request to the Custodian on May 21, 2015, and the request was denied on July 21, 2015, because it allegedly contained a broad generic description of documents and because the records were not specifically identified. The Complainant listed a brief chronology of the communications between the Complainant and the Custodian's Counsel.⁵

⁵ These communications are set forth more fully in the Request and Response section above.

Statement of Information:

On September 3, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on May 21, 2015, and June 2, 2015, and responded as evidenced by the correspondence attached to the complaint.⁶ The Custodian certifies that the Complainant’s “request did not identify any specific document or documents, such as a deed, lis pendens, or even a particular property or properties.”

The Custodian further certifies that the Complainant clarified the records request on June 8, 2015, to “get the same documents that are available on the [C]ounty’s online land record search, but without the watermarks.” The Custodian certifies that at this time the Complainant also specified certain categories of records and narrowed the date parameters. The Custodian contends that the Complainant has never identified any specific document or documents.

The Custodian certifies that the categories of records sought by the Complainant are available free of charge on the agency’s website and can be downloaded in .pdf form. The Custodian certifies that it would take him an incalculatable time to compile the records without the watermark because up to hundreds of thousands of pages would have to be scanned individually and transferred to a storage device. The Custodian attached to the SOI as Exhibit A an “instrument count report” for the Complainant’s date range. The Custodian also attached to the SOI as Exhibit B a printout of the land use search page.

The Custodian certifies that the legal reason for denial is that the “request is vastly overbroad” and that the Complainant already has access to the records. The Custodian cites Bart, 403 N.J. Super. 609, 618 in support of the denial.

The Custodian’s Counsel argues that the Complainant’s request was properly denied for three (3) reasons. First, Counsel argues that the request was overly broad because it did not specifically identify the requested records. Counsel contends that “[a] records request that seeks over 50,000 potential records, without specificity, and, comprising hundreds of thousands of pages, does not remotely ‘satisfy’ OPRA’s ‘reasonable clarity’ requirement. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 550 (App. Div. 2005).”⁷

Counsel next argues that the Custodian did not deny access to the requested records. Counsel contends that the Complainant already had access to the requested records through the Clerk’s website, where she can download the requested records in electronic form. Counsel states that the website provides the same version of the records that the Custodian would provide in hard copy.

Finally, Counsel argues that the request defies the purpose of OPRA. Counsel states that OPRA “‘operates to make identifiable government records readily accessible for inspection, copying, or examination.’ MAG, 375 N.J. Super. at 546.” Counsel states that, from a public policy perspective, the purpose of OPRA is to promote open and transparent government;

⁶ Such correspondence reveals that the Custodian’s Counsel initially responded in writing to the OPRA request on June 4, 2015.

⁷ Cite to Atlantic Reporter, Second omitted.

however here the Complainant represents a commercial enterprise that promotes the sale of real estate and is seeking to shift a portion of business costs to the County and its taxpayers.

Counsel further states that “[r]emoval of a ‘watermark’ from hundreds of thousands of pages of records – *after compilation of those hundreds of thousands of pages* – contravenes the purpose and intent of OPRA by any common sense, practical analysis.” (Emphasis in original).

Analysis⁸

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁹ 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, there is no dispute between the parties that the Complainant submitted the request to the Custodian on May 21, 2015. It is also clear from the evidence of record that the Custodian’s Counsel, on behalf of the Custodian, initially responded in writing to the Complainant on June 4, 2015, which is the ninth (9th) business day following receipt of the request.

Therefore, 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

⁸ The GRC notes that the Complainant is a non-resident requestor. The GRC also notes that it recently decided on whether non-resident requestors had standing to utilize OPRA. See Scheeler, Jr. v. Burlington Twp. (Burlington), GRC Complaint 2015-93 (Final Decision dated September 29, 2016). However, due to multiple pending appeals in NJ Courts, as well as a pending reconsideration request in Scheeler, Jr., GRC 2015-93, the GRC will forgo the standing issue and determine this complaint on the merits.

⁹ 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.

“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 stated that she is requesting electronic copies on a CD or hard drive containing the same document images that are available on the County’s online land record search but without the watermark. The Custodian’s Counsel stated that the Custodian did not deny access to the requested records. Counsel stated that the Clerk’s website provides the same version of the records that the Custodian would provide in hard copy and that the Complainant can download the requested records in electronic form.

In Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014), the complainant requested certain policies and procedures in electronic form. The custodian responded by providing a link to the Internet address where the records could be found. The complainant thereafter alleged he was unlawfully denied access because the custodian failed to electronically deliver to him the responsive records in accord with his request.

The Council found that the custodian did not unreasonably deny access to the requested records because she provided the complainant with a link to the Internet address where the responsive record resided and offered to provide a hard copy of the record if the complainant could not access it online.¹⁰ Indeed, the Council observed that “[d]irecting a requestor to the specific location of a government record on the Internet will save government, and thus taxpayers, time and money, while also providing an efficient and expedient way for a requestor to easily obtain and examine the responsive record as required under OPRA.”

Similar to the facts in Rodriguez, in the instant case the Complainant requested the records in electronic form. The Complainant was able to locate the records online and confirmed that those records were the same document images that she was seeking. Therefore here, it was not necessary for the Custodian to provide a link to the Internet address where the records resided because the Complainant had already located the records online.

However, although the Custodian’s Counsel stated that the Complainant could download the requested records in electronic form, the Complainant’s Counsel argued that the Custodian had an obligation to transfer the images onto a compact disc or hard drive because OPRA provides that a custodian must permit access to records in the medium requested by the requestor.

The GRC disagrees. OPRA provides that “[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. *If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.* N.J.S.A. 47:1A-5(g) (Emphasis added.) The

¹⁰ The Council noted that a custodian is not absolved from providing the record in hardcopy if the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian’s response. However, the Council went on to note that if the request was submitted electronically, or the records were requested to be disclosed electronically, there will be a presumption that the complainant has access to the Internet.

evidence of record reveals that the Custodian disclosed the requested records online. Such a disclosure is “some other meaningful medium,” especially for a commercial requestor that routinely avails itself of information/records posted on the Internet in the course of its business.¹¹

Accordingly, the Custodian has borne his burden of proving that he did not unreasonably deny access to the records requested by the Complainant because the Custodian made the records publicly available by posting them on the Internet, and the evidence of record reveals that the Complainant was able to access the requested records online. N.J.S.A. 47:1A-6. See Rodriguez, GRC 2013-69.

Finally, the Complainant demands that the Custodian remove watermarks from the requested documents. However, the Complainant did not indicate that the watermark affects access to the scanned images. The GRC previously addressed watermarks in Renna v. Somerset Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2008-39 (May 2008). There, Council determined that it did not have jurisdiction over the watermark’s inclusion in the responsive records. In reaching this conclusion, the Council reasoned that:

[T]he watermark does not obscure or obstruct any data contained in the scanned images nor does it otherwise render any part of the scanned images illegible. The watermark is therefore not analogous to a redaction of information contained within a government record . . . because the watermark does not affect access to the scanned images, the Council does not have jurisdiction over the watermark.

Id. at 8 (citing N.J.S.A. 47:1A-7(b), Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005)). Thus, it follows that the Council need not address the raised watermark issue because it has no jurisdiction over the issue. See Renna, GRC 2008-39.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had

¹¹ The Complainant’s Internet sophistication is evidenced by the fact that the Complainant located the records she was seeking online *prior* to submitting the OPRA request that formed the basis of this complaint, as well as by the content of the e-mail, dated July 13, 2015, from the Complainant’s Counsel to the Custodian’s Counsel.

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)).

Here, although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day period, resulting in a "deemed" denial of the request, he did respond to the request in writing by seeking clarification on the ninth (9th) business day. Moreover, 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'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 Custodian has borne his burden of proving that he did not unreasonably deny access to the records requested by the Complainant because the Custodian made the records publicly available by posting them on the Internet, and the evidence of record reveals that the Complainant was able to access the requested records online. N.J.S.A. 47:1A-6. See Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).
3. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day period, resulting in a "deemed" denial of the request, he did respond to the request in writing by seeking clarification on the ninth (9th) business day. Moreover, 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.

Prepared By: John E. Stewart

September 22, 2016¹²

¹² This complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the Council chose to table the matter in order to seek further legal advice.