



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

FINAL DECISION

April 26, 2016 Government Records Council Meeting

Carol Thompson
Complainant

Complaint No. 2015-309

v.

Township of Mansfield (Warren)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Supplemental 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 complied with the Council’s February 23, 2016 Interim Order because she responded in the prescribed time frame by providing the responsive executive session minutes to the Complainant and simultaneously providing certified confirmation of compliance.
2. The Custodian’s failure to respond within the extended time frame resulted in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(i). Further, the evidence of record provides that the Custodian unlawfully denied access to the responsive minutes. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 23, 2016 Interim Order. 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 April, 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: May 2, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Carol A. Thompson¹
Complainant**

GRC Complaint No. 2015-309

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of all 2013 and 2014 Township of Mansfield (“Township”) executive session minutes.

Custodian of Record: Dena Hrebenak

Request Received by Custodian: September 1, 2015

Response Made by Custodian: September 10, 2015

GRC Complaint Received: September 25, 2015

Background

February 23, 2016 Council Meeting:

At its February 23, 2016 public meeting, the Council considered the February 16, 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, found that:

1. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until September 11, 2015, the Custodian’s failure to respond timely in writing within the extended deadline 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 may have unlawfully denied access to the responsive executive session minutes for 2013 and 2014. N.J.S.A. 47:1A-6. The Custodian must therefore disclose all responsive records, which must include a document index should the records contain redactions. If the Custodian believes that certain sets of minutes are exempt in their entirety, she shall include in the document index a specific lawful basis for non-disclosure. Finally, if minutes for specific executive sessions during the identified time frame do not exist, the Custodian must certify to this fact.

¹ No legal representation listed on record.

² No legal representation listed on record.

3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
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.

Procedural History:

On February 24, 2016, the Council distributed its Interim Order to all parties.

On March 7, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that she received the Council's Interim Order on March 1, 2016. The Custodian certified that she simultaneously provided the responsive minutes to the Complainant.⁵

Analysis

Compliance

At its February 23, 2016 meeting, the Council ordered the Custodian to disclose all responsive minutes, with a document index if necessary, and to certify if certain minutes do not exist. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4. On February 24, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order.

On March 7, 2016, the fifth (5th) business day after receipt of the Council's Order, the Custodian certified that she received the Interim Order on March 1, 2016. Further, the Custodian certified that she was simultaneously providing the responsive minutes to the Complainant. Finally, the Custodian provided certified confirmation of compliance.

Therefore, the Custodian complied with the Council's February 23, 2016 Interim Order because she responded in the prescribed time frame by providing the responsive executive session minutes to the Complainant and simultaneously providing certified confirmation of compliance to the Executive Director.

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."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁵ The Custodian copied the Complainant on two (2) e-mails, which included the responsive executive session minutes for 2013 and 2014.

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 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)).

In this matter, the Custodian’s failure to respond within the extended time frame resulted in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(i). Further, the evidence of record provides that the Custodian unlawfully denied access to the responsive minutes. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s February 23, 2016 Interim Order. 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 complied with the Council’s February 23, 2016 Interim Order because she responded in the prescribed time frame by providing the responsive executive session minutes to the Complainant and simultaneously providing certified confirmation of compliance.

2. The Custodian's failure to respond within the extended time frame resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(i). Further, the evidence of record provides that the Custodian unlawfully denied access to the responsive minutes. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's February 23, 2016 Interim Order. 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: Frank F. Caruso
Communications Specialist/Resource Manager

March 22, 2016⁶

⁶ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.



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PO BOX 819
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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

February 23, 2016 Government Records Council Meeting

Carol A. Thompson
Complainant

Complaint No. 2015-309

v.

Township of Mansfield (Warren)
Custodian of Record

At the February 23, 2016 public meeting, the Government Records Council (“Council”) considered the February 16, 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. Although the Custodian timely responded to the Complainant’s OPRA request in writing by requesting an extension until September 11, 2015, the Custodian’s failure to respond timely in writing within the extended deadline 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 may have unlawfully denied access to the responsive executive session minutes for 2013 and 2014. N.J.S.A. 47:1A-6. The Custodian must therefore disclose all responsive records, which must include a document index, should the records contain redactions. If the Custodian believes that certain sets of minutes are exempt in their entirety, she shall include in the document index a specific lawful basis for non-disclosure. Finally, if minutes for specific executive sessions during the identified time frame do not exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February, 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: February 24, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2016 Council Meeting**

**Carol A. Thompson¹
Complainant**

GRC Complaint No. 2015-309

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of all 2013 and 2014 Township of Mansfield (“Township”) executive session minutes.

Custodian of Record: Dena Hrebenak

Request Received by Custodian: September 1, 2015

Response Made by Custodian: September 10, 2015

GRC Complaint Received: September 25, 2015

Background³

Request and Response:

On September 1, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 10, 2015, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing, advising the Complainant that she would provide all responsive records via e-mail on September 11, 2015.

On September 11, 2015, in the late afternoon, the Complainant questioned whether she would receive the records. On September 14, 2015, the Custodian e-mailed the Complainant to apologize for the delay. The Custodian stated that she was waiting on clarification as to whether the records needed redaction. The Custodian stated that she would likely e-mail a number of the responsive minutes to the Complainant on either September 15, or 16, 2015.

Denial of Access Complaint:

On September 25, 2015, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to provide responsive records, even after confirming on both September 10, and September 14, 2015, that she would do so.

Statement of Information:

On October 8, 2015, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On October 23, 2015, the Complainant e-mailed the GRC to seek a status update because she had not received an SOI. On the same day, the GRC confirmed with the Complainant that the Custodian did not submit an SOI and that it would send a reminder to the Township.

On October 28, 2015, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. To date, the GRC has not received a response from the Custodian.

Additional Submissions:

On November 3, 2015, the Complainant e-mailed the GRC, requesting that it move forward to adjudication based on the fact that the Custodian failed to submit an SOI within the allowable time frame.

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).

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.

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.

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.

Here, the Custodian timely responded to the Complainant's OPRA request in writing on the seventh (7th) business day after receipt of same, stating that she would provide the responsive records on September 11, 2015. However, the Custodian failed to respond until September 14, 2015, at which time she advised the Complainant of a new date for disclosure.

Therefore, although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until September 11, 2015, the Custodian's failure to respond timely in writing within the extended deadline results in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2007-124.

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 this matter, the Complainant sought access to executive session minutes for 2013 and 2014. The Custodian initially responded, advising that she would provide records but subsequently responded to advise the Complainant that she was waiting for internal clarification on whether any of the responsive minutes would need redactions. Ultimately, the evidence of record indicates that the Custodian never disclosed any minutes to the Complainant. In the absence of an SOI to provide any evidence to the contrary, the GRC is satisfied that the Custodian may have unlawfully denied access to the responsive minutes.

Accordingly, the Custodian may have unlawfully denied access to the responsive executive session minutes for 2013 and 2014. N.J.S.A. 47:1A-6. The Custodian must therefore disclose all responsive records, which must include a document index, should the records contain redactions. If the Custodian believes that certain sets of minutes are exempt in their entirety, she shall include in the document index a specific lawful basis for non-disclosure. Finally, if minutes for specific executive sessions during the identified time frame do not exist, the Custodian must certify to this fact.

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian timely responded to the Complainant's OPRA request in writing by requesting an extension until September 11, 2015, the Custodian's failure to respond timely in writing within the extended deadline 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 may have unlawfully denied access to the responsive executive session minutes for 2013 and 2014. N.J.S.A. 47:1A-6. The Custodian must therefore disclose all responsive records, which must include a document index, should the records contain redactions. If the Custodian believes that certain sets of minutes are exempt in their entirety, she shall include in the document index a specific lawful basis for non-disclosure. Finally, if minutes for specific executive sessions during the identified time frame do not exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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.

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

February 16, 2016