



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

September 25, 2018 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2016-133

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council (“Council”) considered the September 18, 2018 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 the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 8, 2018. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of September, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

A handwritten signature in black ink, appearing to read "Ritardi". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 27, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
September 25, 2018 Council Meeting**

Jeffrey W. Sauter¹
Complainant

GRC Complaint No. 2016-133

v.

Township of Colts Neck (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Copies to be picked up of:

1. Supporting records for Resolution No. 2015-80.
2. Supporting records for Resolution No. 2015-81.³

Custodian of Record: Beth Kara

Request Received by Custodian: January 22, 2016

Response Made by Custodian: February 24, 2016

GRC Complaint Received: April 26, 2016

Background

July 25, 2017 Council Meeting:

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 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. 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. Because there are conflicting statements as to the existence of all of the requested supporting records for the two resolutions, the complaint should be referred to the

¹ No legal representation listed on record.

² Represented by David A. Clark, Esq., of Gluck Walrath LLP (Red Bank, NJ).

³ There were other records requested that are not relevant to this complaint.

Office of Administrative Law for a determination of whether Custodian Beth Kara, Township Administrator Kathleen Capristo, and/or any other Township official unlawfully denied access to the records, and if so to order disclosure of said records.

3. 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 conclusion of the Office of Administrative Law's fact-finding hearing.

Procedural History:

On July 27, 2017, the Council distributed its July 25, 2017 Interim Order to all parties. On October 4, 2017, the complaint was transmitted to the Office of Administrative Law ("OAL"). On August 8, 2018, the Complainant sent a letter to the OAL withdrawing the complaint.⁴ On August 24, 2018, the OAL returned the complaint back to the GRC marked "withdrawn."

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 8, 2018. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

September 18, 2018

⁴ The Complainant stated in the letter that, "... this withdrawal only relates to that portion of the GRC complaint that was referred to OAL for review and determination, and nothing else." However, there is nothing further for the GRC to adjudicate because the analysis of a knowing and willful violation was contingent upon the findings of the OAL during its fact-finding hearing.



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 25, 2017 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2016-133

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 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. Because there are conflicting statements as to the existence of all of the requested supporting records for the two resolutions, the complaint should be referred to the Office of Administrative Law for a determination of whether Custodian Beth Kara, Township Administrator Kathleen Capristo, and/or any other Township official unlawfully denied access to the records, and if so to order disclosure of said records.
3. 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 conclusion of the Office of Administrative Law’s fact-finding hearing.



Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2017

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, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

Jeffrey W. Sauter¹
Complainant

GRC Complaint No. 2016-133

v.

Township of Colts Neck (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Copies to be picked up of:

1. Supporting records for Resolution No. 2015-80.
2. Supporting records for Resolution No. 2015-81.³

Custodian of Record: Beth Kara
Request Received by Custodian: January 22, 2016
Response Made by Custodian: February 24, 2016
GRC Complaint Received: April 26, 2016

Background⁴

Request and Response:

On January 22, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 24, 2016, the twenty-second (22nd) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that the records he requested pertaining to the 2015 Length of Service Award Program (“LOSAP”) are awaiting pickup and that the copying cost is \$0.49.

Denial of Access Complaint:

On April 26, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he delivered the OPRA request to the Custodian on January 22, 2016. The Complainant further asserts that after not receiving a response for several weeks, he sent the Custodian a follow-up letter, dated February

¹ No legal representation listed on record.

² Represented by Michael J. Giarrusso, Esq., of Dilworth Paxson LLP (Red Bank, NJ).

³ There were other records requested that are not relevant to this complaint.

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.

17, 2017. Thereafter, on February 24, 2016, the Complainant states that he received a response from the Custodian, informing him that the records were ready for pick up. The Complainant states that he picked up the records the following day.

The Complainant contends that, upon reviewing the records, he noticed some discrepancies and e-mailed Township Administrator Kathleen Capristo on February 25, 2016, to obtain clarification. The Complainant attached an e-mail string to his complaint, which reveals that the questions he posed to the Township Administrator are:

1. “[t]he total contributions supported in the dual resolution spreadsheets does not equal the actual amount paid to Lincoln Financial. Can you explain why and/or provide the corrected spreadsheets to equal the dollar amount of \$29,590 paid on the PO?
2. If the spreadsheet is correct, then could you then provide either the amended PO or additional PO issued to pay Lincoln Financial the full correct amount?
3. Can you please explain why [five members entitled to LOSAP contributions] did not receive their contributions when the spreadsheet shows otherwise[?]⁵

On February 29, 2016, the Township Administrator answered the Complainant’s questions by stating that the answers to his questions were printed in red ink.⁶ E-mail communications continued between the Complainant and the Township Administrator until March 14, 2016. The Complainant states that although the Township Administrator informed him in the e-mails that the Custodian’s response was “accurate and complete,” he replied that he does not believe that is the case. The Complainant states that the Custodian was copied on all of the e-mails. The Complainant further states that the Township Administrator offered to meet with him to explain the content of the records but subsequently revoked the offer and advised that their communications must be in writing.

The Complainant states that, because the responses he received from the Custodian and the Township Administrator were unsatisfactory, he confronted Mayor Thomas Orgo on March 9, 2016, and again on March 23, 2016, to obtain answers to his questions. The Complainant states that the Custodian was also present on both occasions when he spoke to the Mayor. The Complainant states that the Mayor told him that he would look into the matter.

The Complainant contends that the Township has not produced all of the records responsive to his request. The Complainant concludes that the Custodian, Township Administrator Kathleen Capristo, Mayor Thomas Orgo, and other unnamed Township officials have knowingly and willfully denied him all of the records responsive to his request.

⁵ The Complainant asked another question related to the Township’s filing procedures, which had nothing to do with clarification of the records disclosed or the content of those records.

⁶ The Complainant attached a black and white copy of the e-mail string to the complaint, and although the GRC might be able to determine where the Township Administrator’s answers were sandwiched into the e-mail, the potential for an error exists; therefore the GRC declines to do so.

Statement of Information:

On May 19, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 22, 2016, and responded in writing on February 24, 2016, informing the Complainant that copies of the following requested records in unredacted form were available for pickup:

1. Resolution 2015-80, including copies of all supporting records (two pages).
2. Resolution 2015-81, including copies of all supporting records (four pages).
3. All purchase orders issued by the Township in 2015 with regard to LOSAP (one page).

The Custodian certifies that that the Complainant received all requested records. The Custodian further certifies that although she acted in good faith responding to the Complainant’s OPRA request, she believes that the Complainant is acting in bad faith. The Custodian’s legal argument consists of ten (10) enumerated paragraphs. With the exception of paragraph number 6, the legal argument centers upon the reasons why the Custodian believes the Complainant is acting in bad faith by making OPRA requests.⁷ Paragraph number 6 addresses, *inter alia*, the Custodian’s untimely response and asserts that “any delay here was due to mere one-off [sic] inadvertence and not due to any bad faith, wrongdoing, or willful denial.”

Additional Submissions:

On June 15, 2016, the Complainant replied to the Custodian’s SOI. The Complainant first addressed the Custodian’s untimely response. The Complainant states that the Custodian had ample time to respond to his OPRA request but did not do so until he submitted a follow up letter to the Custodian several weeks after he submitted the request. The Complainant also goes into detail explaining the importance to him in obtaining copies of the requested records.⁸ The Complainant detailed the content of the records that were provided in response to the request and why he believes a discrepancy exists.⁹ The Complainant concludes that incorrect records were disclosed, partial records were disclosed, or the certification process was faulty. The Complainant defended his actions against the Custodian’s assertions in the legal argument, which alleged that the Complainant was acting in bad faith. The Complainant contends that his engagement and interaction with local government officials should have no bearing on the facts of this case.

⁷ Except for paragraph number 6, the Custodian’s legal argument is not pertinent to this complaint. The argument lists several reasons in support of the Custodian’s allegation that the Complainant holds the status of “an extremely engaged citizen in Colts Neck.” The implication is that such status somehow obviates the need for him to file OPRA requests. The Custodian does assert in her argument that the resolutions sought by the Complainant were posted to the Township’s website approximately seven (7) months prior to the date of his request; however, as noted in Footnote 3, said resolutions are records not relevant to this complaint.

⁸ The Complainant’s reasons for requesting the records are not relevant to the complaint because OPRA does not require the requestor to provide a reason for requesting the records and the GRC does not conduct a common law right of access analysis.

⁹ The Council has no authority over the content of the records provided. N.J.S.A. 47:1A-7(b); See Kwanzaa v. Dep’t of Corr., GRC Complaint No. 2004-167 (March 2005). See also Valdes v. Township of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).

Analysis

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).¹⁰ 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, it is undisputed between the parties that the Custodian received the Complainant's OPRA request on January 22, 2016, and did not respond in writing until February 24, 2016. As such, the Custodian failed to respond to the Complainant's request until the twenty-second (22nd) business day following receipt of said 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 "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 is seeking supporting records for two resolutions. Although the Custodian stated that the Complainant received all of the requested records, the Complainant aggressively argued that, based upon the content of the records that were provided in the Custodian's response, the Custodian failed to disclose all of the requested records. The Complainant further asserted that the Custodian and several municipal officials evaded his questions regarding discrepancies he found in the provided records, which militates toward a knowing and willful denial of access to other records that were not provided.

Given the Custodian's representations that all records responsive to the request were disclosed, and the Complainant's assertions that all records responsive to the request could not

¹⁰ 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.

have been disclosed, the GRC is “unable to make a determination as to the accessibility of [the records] based upon the complaint and the custodian’s response thereto . . .” N.J.A.C. 5:105-2.7.

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). Accordingly, because there are conflicting statements as to the existence of all of the requested supporting records for the two resolutions, the complaint should be referred to OAL for a determination of whether Custodian Beth Kara, Township Administrator Kathleen Capristo, and/or any other Township official unlawfully denied access to the records, and if so to order disclosure of said records.

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 conclusion of the OAL’s fact-finding hearing.

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. Because there are conflicting statements as to the existence of all of the requested supporting records for the two resolutions, the complaint should be referred to the Office of Administrative Law for a determination of whether Custodian Beth Kara, Township Administrator Kathleen Capristo, and/or any other Township official unlawfully denied access to the records, and if so to order disclosure of said records.
3. 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 conclusion of the Office of Administrative Law’s fact-finding hearing.

Prepared By: John E. Stewart

July 18, 2017