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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 27, 2018 Government Records Council Meeting

Raquel Horowitz
Complainant

Complaint No. 2016-189

v.

City of Long Branch Housing Authority (Monmouth)
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Findings and Recommendations of the Council Staff 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond 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 Complainant’s request item Nos. 1 through 8 represent an invalid request for information that fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).
3. The Custodian bore her burden of proof that the denial of access to requested waiting list was lawful. N.J.S.A. 47:1A-6. The City of Long Branch Housing Authority waiting list and all personal information contained therein qualifies as confidential information under the Privacy Act of 1974 and there is no evidence in the record that any person thereon provided consent of disclosure as mandated by 5 U.S.C. 522a(b). N.J.S.A. 47:1A-9(a); Diskind v. N.J. Dep’t of Cmty. Affairs, Div. of Hous. & Cmty. Res., GRC Complaint No. 2011-279 (December 2012).



4. The Custodian's failure to respond to the Complainant's OPRA request in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant's request item Nos. 1 through 8 were invalid because they sought information rather than an identifiable government record. Further, the Custodian lawfully denied access to the record responsive to item No. 9. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; 5 U.S.C. §552a. Additionally, the evidence of record does not indicate that the Custodian's technical 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 27th Day of March, 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: March 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
March 27, 2018 Council Meeting**

**Raquel Horowitz¹
Complainant**

GRC Complaint No. 2016-189

v.

**City of Long Branch Housing Authority (Monmouth) ²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of:

1. The Complainant's position on the Section 8 waiting list (as of the date the Custodian responds to the OPRA request).
2. The number of new voucher recipients first receiving them from January 1, 2016 to present.
3. The number of new voucher recipients in 2015.
4. The number of new voucher recipients in 2014.
5. The number of new voucher recipients in 2013.
6. The number of new voucher recipients in 2012.
7. The number of new voucher recipients in 2011.
8. The number of new voucher recipients in 2010.
9. List of all new voucher recipients from January 1, 2010, including name, address, and telephone number (if listed).

Custodian of Record: Iris Mercado

Request Received by Custodian: June 6, 2016

Response Made by Custodian: None

GRC Complaint Received: July 8, 2016

Background³

Request and Response:

On June 2, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian did not respond to the Complainant's OPRA request.

¹ No legal representation listed on record.

² Represented by Kevin E. Kennedy, Esq., of Law Office of Kevin E. Kennedy, LLC (Red Bank, 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.

Denial of Access Complaint:

On July 8, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the City of Long Branch Housing Authority (“LBHA”) received her OPRA request via certified mail on June 6, 2016. The Complainant asserted that to date, the Custodian had not responded to the OPRA request.

Statement of Information:⁴

On December 30, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 6, 2016. The Custodian certified that she responded in writing in September 2016 disclosing a response to item Nos. 1 through 8.

The Custodian stated that the LBHA operates and exists within the laws, rules, and regulations of the United States and State of New Jersey to provide affordable housing to income qualifying individuals. The Custodian affirmed that the Section 8 department places individuals in homes owned by private individuals in a renter basis. The Custodian certified that currently the LBHA is operating under an availability shortage that forced them to maintain a waiting list. The Custodian noted that it is common for individuals on the list to inquire as to their position.

The Custodian averred that here, the Complainant was given her place on the list (responsive to item No. 1) and statistical information about new vouchers (responsive to item No. 2 through 8), but has also requested personal information of other individuals receiving new voucher benefits for the last seven (7) years. The Custodian contended that this information, found on the waiting list, is exempt under a number of federal acts including the Privacy Act of 1974 (“Act”)(5 U.S.C. §552a) and Section 6 of the Housing Act of 1937. The Custodian noted that the United States Department of Housing and Urban Development (“HUD”) released notice PIH2010-15 in or about 2010 to urge housing authorities to safeguard personal information. The Custodian argued that individuals receiving benefits must consent to disclosure; the LBHA has received no such consent. The Custodian also contended that these individuals may not want to broadcast that they are seeking Section 8 assistance or may fear unsolicited contact. Further, the Custodian contended that disclosing individual voucher information could have a significant, negative impact on tenant-landlord relationships.

Additionally, the Custodian asserted that the LBHA has established a balancing test in accordance with New Jersey laws to decide on disclosure of personal information. The Custodian asserted that when applied here, the requested personal information should be exempt from disclosure. The Custodian asserted that the individuals on the waiting list have an express expectation of privacy and there is a potential for harm to them if this information is disclosed. The Custodian further asserted that no individuals on the list have consented to disclosure of their information. The Custodian also asserted that there is no recognizable need for the public to obtain a copy of the list. The Custodian did note that individuals on the list have a need to know their position on it, but not information regarding other individuals. The Custodian argued that the

⁴ On July 26, 2016, this complaint was referred to mediation. On November 22, 2016, this complaint was referred back to the GRC for adjudication.

LBHA is unaware of any authority requiring disclosure of personal information contained on the list, but that HUD regulations require regular review of the list to confirm that all information is proper. The Custodian expressed concern that LBHA would be exposed to litigation if they released individual personal information to the public.

The Custodian thus requested that the GRC uphold her denial of individual personal information on the waiting list. Further, the Custodian asserted that should the GRC require disclosure, her actions were not knowing and willful in the totality of the circumstances.

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).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).

The Complainant filed the instant complaint contending that she did not receive a response from the Custodian. In the SOI, the Custodian certified that she received the subject OPRA request on June 6, 2016. Thus, seven (7) business day time frame ended on June 15, 2016. However, the Custodian certified in the SOI that she did not respond until September, 2016. The evidence of record thus supports that the Custodian failed to respond in a timely manner.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond 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.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information.*

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.

Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ N.J. Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The GRC deemed that the complainant’s request was a request for information, holding that “. . . because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] . . .” Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Further, in Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015), the complainant sought, among other information, the “total number of applicants” interviewed or hired by race and gender. The Council held that the request was invalid because it sought information (citing Litchult, Jr. v. Borough of Waldwick Police Dep’t (Bergen), GRC Complaint No. 2010-159 (May 2011)).

Here, the Complainant’s request item No. 1 sought her “position on the Section 8 waiting list.” Further, the Complainant’s request item Nos. 2 through 8 sought the “number of new voucher recipients” for a seven (7) year period. These request items are similar to the requests in LaMantia, GRC 2008-140 and Redd, GRC 2014-185 in that they seek information. As such, the Council’s decision in those complaints is applicable herein. While the GRC recognizes that the Custodian

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

made an accommodation by providing various information to the Complainant during the pendency of this complaint, these request items are nonetheless invalid.

Accordingly, the Complainant's request item Nos. 1 through 8 represent an invalid request for information that fails to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; LaMantia, GRC 2008-140; Redd, GRC 2014-185.

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.

Further, OPRA provides that its provisions "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the Governor . . . any *federal law*; *federal regulation*; or federal order." N.J.S.A. 47:1A-9(a) (emphasis added).

The Act provides that:

The term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual . . .

"system of records" means a group of any records under the control of any agency from which information is retrieved by the name of individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

"Federal benefit program" means any program administered or fund by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans or loan guarantees to individuals.

[5 U.S.C. 522a(a)(4), (5), (12).]

Further, the Act exempts disclosure to records as prescribed below:

No agency shall disclose any records which is contained in a system of records by any means . . . except pursuant to a written request by, or with the prior consent of, the

individual to whom the record pertains . . .

[5 U.S.C. 522a(b).]

In Diskind v. N.J. Dep't of Cmty. Affairs, Div. of Hous. & Cmty. Res., GRC Complaint No. 2011-279 (December 2012), the complainant sought multiple records regarding his Section 8 file. In the SOI, the custodian argued that the responsive records were exempt from disclosure due to privacy interest and Executive Order No. 26 (Gov. McGreevey, 2002). The custodian also noted that the Housing Choice Voucher Administrative Plan required the complainant to sign a release, which he refused to do. The Council upheld the denial of access based on the Act and due to the fact that the complainant did not sign a release. 5 U.S.C. § 522a(b).

Here, the Complainant's OPRA request item No. 9 sought a list of all voucher recipients from 2010 to the present to include personal information of each recipient. In the SOI, the Custodian identified the waiting list as the responsive record, but argued that it was not disclosable under OPRA or the Act.

While the list is not similar to the application in Diskind, the GRC nonetheless applies this decision here. Specifically, the evidence of record shows that LBHA administers a Section 8 program in accordance with HUD statutes and regulations. Further, the responsive list is maintained for the purposes of administering LBHA's availability-shortened Section 8 housing program. Within this framework, the waiting list contains information that the Act specifically exempts. That is, personal information contained in LBHA's possession for the administration of a Federal benefit program. Further, there is no evidence in record to indicate that anyone on the list provided consent to allow disclosure. Thus, the GRC is satisfied that the waiting list is exempt from disclosure in its entirety.

Accordingly, the Custodian bore her burden of proof that the denial of access to requested waiting list was lawful. N.J.S.A. 47:1A-6. The LBHA waiting list and all personal information contained therein qualifies as confidential information under the Act and there is no evidence in the record that any person thereon provided consent of disclosure as mandated by 5 U.S.C. 522a(b). N.J.S.A. 47:1A-9(a); Diskind, GRC 2011-279.

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)).

Here, the Custodian’s failure to respond to the Complainant’s OPRA request in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant’s request item Nos. 1 through 8 were invalid because they sought information rather than an identifiable government record. Further, the Custodian lawfully denied access to the record responsive to item No. 9. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; 5 U.S.C. §552a. Additionally, the evidence of record does not indicate that the Custodian’s technical 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 Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond 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 Complainant’s request item Nos. 1 through 8 represent an invalid request for information that fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to these items. N.J.S.A. 47:1A-6; LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Redd v. Franklin Twp. Pub. Sch. (Somerset), GRC Complaint No. 2014-185 (February 2015).
3. The Custodian bore her burden of proof that the denial of access to requested waiting list was lawful. N.J.S.A. 47:1A-6. The City of Long Branch Housing Authority waiting list and all personal information contained therein qualifies as confidential information

under the Privacy Act of 1974 and there is no evidence in the record that any person thereon provided consent of disclosure as mandated by 5 U.S.C. 522a(b). N.J.S.A. 47:1A-9(a); Diskind v. N.J. Dep't of Cmty. Affairs, Div. of Hous. & Cmty. Res., GRC Complaint No. 2011-279 (December 2012).

4. The Custodian's failure to respond to the Complainant's OPRA request in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant's request item Nos. 1 through 8 were invalid because they sought information rather than an identifiable government record. Further, the Custodian lawfully denied access to the record responsive to item No. 9. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9; 5 U.S.C. §552a. Additionally, the evidence of record does not indicate that the Custodian's technical 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 20, 2018