



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Bryan Tomko
Complainant

Complaint No. 2016-215

v.

City of Linden (Union)
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 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. Ms. Honan did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Although Ms. Honan requested an extension of time to respond within the statutorily mandated seven (7) business days, she failed to provide a response within the extended time period, resulting in a “deemed” denial. 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 dated October 31, 2007).
2. Notwithstanding Ms. Honan’s ‘deemed’ denial, she did not unlawfully deny access to Item No. 3 of the Complainant’s May 16, 2016 OPRA request. N.J.S.A. 47:1A-6. Fulfilling the Complainant’s request would require Ms. Honan or the Custodian to conduct research and create a new record, which they are not obligated to perform under OPRA. See MAG Entm’t v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), and Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007).
3. Ms. Honan violated N.J.S.A. 47:1A-5(i) by failing to provide a response to the Complainant’s OPRA request within the extended time period. However, the evidence in the record demonstrates that fulfilling Item No. 3 the request would require the Custodian or Ms. Honan to perform research and create a new record. Moreover, the evidence of record does not indicate that Ms. Honan’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Honan’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 30th Day of October, 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: November 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Bryan Tomko¹
Complainant**

GRC Complaint No. 2016-215

v.

**City of Linden (Union)²
Custodial Agency**

Records Relevant to Complaint: Copies of:³

1. 2007 City of Linden Personnel Policy as referenced in the January 15, 2008 Resolution to Enforce City of Linden Residency Requirement, Paragraph #1.
2. The name and position of City of Linden employees who were granted an exemption to the City of Linden Residency Requirement, between the dates of January 15, 2008 and today's date of May 13, 2016.
3. The name and position of City of Linden employees who, between the dates of January 15, 2008 and July 1, 2008 submitted corrected addresses outside the City of Linden as demanded by then Councilman Gene Davis in a letter to City employees dated April 25, 2008.

Custodian of Record: Joseph C. Bodek

Requests Received by Custodian: May 16, 2016

Response Made by Custodian: May 26, 2016; May 27, 2016

GRC Complaint Received: August 2, 2016

Background⁴

Request and Response:

On May 16, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On May 26, 2016, the Deputy Clerk, Jennifer Honan ("Ms. Honan") responded to the Complainant, stating that the request was

¹ No representation listed on record.

² Represented by Daniel Antonelli, Esq. (Linden, NJ).

³ The Complainant sought other records that are not at issue in this matter. Additionally, while the Complainant sought the records in two (2) OPRA requests, they will be referred to as a single OPRA request for clarity.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

forwarded to the Personnel Department and Municipal Treasurer, but has not received a response from either. On May 27, 2016, Ms. Honan sent another letter to the Complainant, stating that the Personnel Department needed a fifteen (15) business day extension to provide the requested records. There are no further communications between the parties prior to the filing of the complaint.

Denial of Access Complaint:

On August 2, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he waited close to a month before reaching out to the Custodian via telephone to inquire about the status of his OPRA request. The Complainant also asserted that he visited the Clerk’s Office in person on July 19, 2016 regarding his request. The Complainant stated that Ms. Honan told him that she would look into it. The Complainant asserted that as of the date he verified this complaint (August 1, 2016), he has not received any correspondence from the City of Linden (“City”) regarding his request.

Statement of Information:

On September 1, 2016 the Custodian filed a Statement of Information (“SOI”). The Custodian certified that Ms. Honan received the Complainant’s OPRA request on May 16, 2016. The Custodian certified that Ms. Honan responded in writing on May 26, 2016, stating that the request was forwarded to the Personnel Department and Municipal Treasurer, but no response from them has been received. The Custodian then certified that on May 27, 2016, Ms. Honan informed the Complainant that an additional fifteen (15) business days were needed to fulfill the request.

The Custodian certified that responsive records were attached to the SOI and provided to the Complainant for all three (3) request items. As to Item No. 3 specifically, the Custodian asserted that redactions were made to the home addresses of the listed employees. The Custodian also contended that a clerical oversight was reason why the response was not provided until the seventy-sixth (76th) business day after receipt of the request.

Additional Submissions:

On September 1, 2016, the Complainant responded to the Custodian’s SOI via e-mail. The Complainant asserted that the records provided by the Custodian in response to Item No. 3 were not responsive. The Complainant stated that he sought the names and positions of City employees who submitted corrected addresses that were outside the City limits. The Complainant asserted that what was provided appeared to be a general list of most or all City employees on record.

Ms. Honan, on behalf of the Custodian, responded to the Complainant on September 2, 2016, stating that the records provided originated from the Municipal Treasurer’s Office/Personnel Department. Ms. Honan added that valid OPRA requests do not ask questions, do not seek information, and do not require a custodian to conduct research or create a new record. Ms. Honan stated that if the requested record does not exist, it would not be provided to the Complainant under the guidelines listed above.

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 dated October 31, 2007).

In the instant matter, the Ms. Honan responded to the Complainant, stating that the Personnel Department needed a fifteen (15) business day extension to provide the requested records. However, the Custodian did not provide a complete respond prior to filing the SOI, several weeks later. The Custodian admitted that the delay was due to a clerical error.

Therefore, Ms. Honan did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Although Ms. Honan requested an extension of time to respond within the statutorily mandated seven (7) business days, she failed to provide a response within the extended time period, resulting in a "deemed" denial. 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.

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. 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 v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).]

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.

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. at 549 (emphasis added). See also), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. 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 Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as “to go or look through carefully in order to find something missing or lost.” The word research, on the other hand, means “a close and careful study to find new facts or information.” (Footnotes omitted.)

[Id.]

Invalid OPRA requests typically fall into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, etc.) requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that

is either not on an official OPRA request form or does not invoke OPRA. See e.g., Naples v. N.J. Motor Vehicle Comm'n, GRC Complaint No. 2008-97 (December 2008).

However, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court reversed the trial court's decision by holding that a plaintiff's request for "EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . ." was valid under OPRA because it "was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally." Id. at 176. The Court noted that plaintiff had "narrowed the scope of the inquiry to a discrete and limited subject matter," and that fulfilling the request would involve "no research or analysis, but only a search for, and production of," identifiable government records. The Court reasoned that "the fact that the custodian of records in this case actually performed a search and was able to locate and identify records responsive to plaintiff's request belies any assertion that the request was lacking in specificity or was overbroad." Id. at 177.

In the instant matter, the Complainant sought the names and positions of employees who submitted corrected addresses outside the City limits in 2008. Ms. Honan provided a list of City employees as attached to the SOI. However, the Complainant asserted that the provided record was not what he asked for, in that it appears to be a list of every employee in the City in 2008. Even though Ms. Honan provided a record that is closely related to the types of documents sought in the request, she maintained, unlike the plaintiff in Burke, that the request's validity would be called into question if compelled to provide a more precise response. 429 N.J. Super. at 177.

The GRC agrees with Ms. Honan. While the Complainant's request for those employees receiving an exemption from the residency requirement (see request Item No. 2) could be searched and located, the Complainant also requested the identities of employees who changed their home addresses in response to a letter from a Councilmember. Fulfilling the request would require the Custodian to locate and communicate directly with every employee identified in Item No. 2, inquiring as to whether they had to correct their address in response to the Councilmember's letter. These actions go beyond a mere search and into the realm of research, which a Custodian is not obligated to do under OPRA. See MAG, 375 N.J. Super. at 534, and Donato, GRC 2005-182.

Therefore, notwithstanding Ms. Honan's 'deemed' denial, she did not unlawfully deny access to Item No. 3 of the Complainant's May 16, 2016 OPRA request. N.J.S.A. 47:1A-6. Fulfilling the Complainant's request would require Ms. Honan or the Custodian to conduct research and create a new record, which they are not obligated to perform under OPRA. See MAG, 375 N.J. Super. at 546, and Donato, GRC 2005-182.

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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, Ms. Honan violated N.J.S.A. 47:1A-5(i) by failing to provide a response to the Complainant’s OPRA request within the extended time period. However, the evidence in the record demonstrates that fulfilling Item No. 3 the request would require the Custodian or Ms. Honan to perform research and create a new record. Moreover, the evidence of record does not indicate that Ms. Honan’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Honan’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. Ms. Honan did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Although Ms. Honan requested an extension of time to respond within the statutorily mandated seven (7) business days, she failed to provide a response within the extended time period, resulting in a “deemed” denial. 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 dated October 31, 2007).
2. Notwithstanding Ms. Honan’s ‘deemed’ denial, she did not unlawfully deny access to Item No. 3 of the Complainant’s May 16, 2016 OPRA request. N.J.S.A. 47:1A-6. Fulfilling the Complainant’s request would require Ms. Honan or the Custodian to conduct research and create a new record, which they are not obligated to perform under OPRA. See MAG Entm’t v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), and Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007).

3. Ms. Honan violated N.J.S.A. 47:1A-5(i) by failing to provide a response to the Complainant's OPRA request within the extended time period. However, the evidence in the record demonstrates that fulfilling Item No. 3 the request would require the Custodian or Ms. Honan to perform research and create a new record. Moreover, the evidence of record does not indicate that Ms. Honan's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Honan'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: Samuel A. Rosado
Staff Attorney

October 23, 2018