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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Lois Annette Lebbing
Complainant

Complaint No. 2016-251

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 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:

1. The Custodian failed her burden of proof that she timely responded to the Complainant’s July 11, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond 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). Further, the Custodian’s response was insufficient because she failed to address the Complainant’s preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Borough’s unapproved meeting minutes responsive to the Complainant’s July 11, 2016 OPRA request constitute ACD material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018) Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
3. In the matter before the Council, the Custodian failed to timely respond to the Complainant’s request under N.J.S.A. 47:1A-5(i) and failed to consider the Complainant’s preferred method of delivery under N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access, as the meeting minutes sought by the Complainant were unapproved at the time of the request. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 13th Day of November, 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 15, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Lois Annette Lebbing¹
Complainant**

GRC Complaint No. 2016-251

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of all 2016 council meeting minutes with agendas.

Custodian of Record: Joan Hullings

Request Received by Custodian: July 11, 2016

Response Made by Custodian: July 28, 2016

GRC Complaint Received: September 6, 2016

Background

Request and Response:

On July 11, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 28, 2016, thirteen (13) business days later, the Custodian provided the Complainant with copies of responsive records when she arrived at the Custodian’s office.

Denial of Access Complaint:

On September 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she verbally requested the records on July 5, 2016 and was told that no minutes for the 2016 year were available. The Complainant then stated that she filled out the OPRA request and hand delivered it on July 11, 2016 and was verbally informed by the Custodian that day that the requested records were still not yet available, “but will be . . . very soon.”

The Complainant stated that on July 28, 2016, she went to the Custodian’s office in person and was provided forty-nine (49) pages of records. The Complainant noted that she originally requested to inspect the responsive records but was given copies. Upon review, the Complainant alleged that the response included only the minutes from January 2016 meetings.

¹ No representation listed on record.

² Represented by Andrew M. Slom, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

The Complainant argued that meeting minutes should be promptly available, referencing “The Citizen’s Manual” by Harry Pozycki, and “New Jersey Practice, Vol. 34” by M. Pane.³

The Complainant also identified other instances which allegedly demonstrate a pattern by the Borough of High Park (“Borough”) to delay the approval of meeting minutes. The Complainant asserted that on February 3, 2015, the Borough approved the September, October, and December 2014 minutes; on July 7, 2015, the Borough approved the April, May, and June 2015 minutes; on October 2015, the Borough approved the August and September 2015 minutes; and on January 19, 2016, the Borough approved the November, December, and Special October 2015 meeting minutes.

Statement of Information:

On November 21, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s written OPRA request for records on July 11, 2016. The Custodian certified that as of July 11, 2016, the Borough had not adopted any meeting minutes for the 2016 year.

The Custodian then certified that on July 28, 2016, the Complainant arrived in person and was provided with all approved meeting minutes for 2016. The Custodian certified that as of July 28, 2016, the only meeting minutes that have been approved in 2016 has been for the month of January. The Custodian then certified that as of the date of the SOI, meeting minutes have been approved through May 2016. The Custodian asserted that the reason for the delay in approval has been due to limited staffing and summer work hours.

Analysis

Timeliness/Insufficient Response

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 dated October 31, 2007).

³ The Complainant also referenced the Open Public Meetings Act (“OPMA”), however the GRC does not have the authority to adjudicate issues that arise under OPMA. N.J.S.A. 47:1A-7(b); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).

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.

Additionally, the GRC has previously adjudicated complaints in which a custodian did not address the preferred method of delivery. In Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014), the complainant identified his preferred method of delivery as “electronic copies on compact disc or USB drive.” The custodian timely responded but did not address the complainant’s preferred method of delivery. The Council, relying on its past decision in O’Shea v. Twp. of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008) (stating “[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the [c]ustodian was given two ways to comply and should have, therefore, responded acknowledging the [c]omplainant’s preferences with a sufficient response for each.”), held that the custodian’s response was insufficient. See also Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008) (although the custodian timely responded granting access to the requested record, the custodian’s response was insufficient because she failed to address the preferred method of delivery); Wolosky v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2009-194 (Interim Order dated August 24, 2010) (the custodian’s response was insufficient because he did not address the complainant’s preferred method of delivery).

In the instant complaint, the Complainant contended that she submitted her OPRA request on July 11, 2016. The Custodian certified that she responded on July 28, 2016, without any explanation for responding beyond the mandated seven (7) business day deadline to respond. Nor did the Custodian seek an extension of time to respond. Furthermore, the Complainant sought access to the responsive records via on-site inspection. However, when the Custodian responded to the OPRA request on July 28, 2016 she disclosed forty-nine (49) pages of records via e-mail. At no point in her initial response did she address the Complainant’s preferred method of delivery. Consistent with the Council’s decision in Delbury, GRC 2013-240, the Custodian’s initial response was insufficient.

Therefore, the Custodian failed her burden of proof that she timely responded to the Complainant’s July 11, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond 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. Further, the Custodian’s response was insufficient because she failed to address the Complainant’s preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury, GRC 2013-240.

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.

OPRA further provides that “[g]overnment record’ or ‘record’ means any paper, written or printed book . . . information stored or maintained electronically . . . [t]he terms shall not include inter-agency, intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A.

47:1A-1.1. Regarding draft meeting minutes, the exempt nature of draft meeting minutes was recently upheld by the Appellate Division. Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018). In addition, the Council has previously determined that draft minutes are exempt from disclosure pursuant to OPRA, stating “. . . the Custodian has not unlawfully denied access to the requested meeting minutes as . . . said minutes had not been approved by the governing body and as such, they constitute [ACD] material and are exempt from disclosure . . .” Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006) (citing N.J.S.A. 47:1A-1.1). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009); Wolosky v. Stillwater Twp. (Sussex), GRC Complaint No. 2009-30 (January 2010).

Here, the Complainant sought all Borough meeting minutes for the 2016 year. In the SOI, the Custodian certified that at the time of the request, the Borough had not approved any meeting minutes beyond January 2016, and thus were exempt from disclosure (citing Parave-Fogg, GRC 2006-51). The Custodian was not obligated to disclose the draft minutes to the complaint because they constituted ACD material.

Accordingly, the Borough's unapproved meeting minutes responsive to the Complainant's July 11, 2016 OPRA request constitute ACD material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. at 83; Parave-Fogg, GRC 2006-51. Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

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 the matter before the Council, the Custodian failed to timely respond to the Complainant's request under N.J.S.A. 47:1A-5(i) and failed to consider the Complainant's preferred method of delivery under N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access, as the meeting minutes sought by the Complainant were unapproved at the time of the request. Additionally, the evidence of record does not indicate that the Custodian's violations 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 failed her burden of proof that she timely responded to the Complainant's July 11, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond 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). Further, the Custodian's response was insufficient because she failed to address the Complainant's preferred method of delivery (on-site inspection). N.J.S.A. 47:1A-5(g); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).
2. The Borough's unapproved meeting minutes responsive to the Complainant's July 11, 2016 OPRA request constitute ACD material and are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018) Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Thus, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
3. In the matter before the Council, the Custodian failed to timely respond to the Complainant's request under N.J.S.A. 47:1A-5(i) and failed to consider the Complainant's preferred method of delivery under N.J.S.A. 47:1A-5(g). However, the Custodian did not unlawfully deny access, as the meeting minutes sought by the Complainant were unapproved at the time of the request. Additionally, the evidence of record does not indicate that the Custodian's violations 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: Samuel A. Rosado
Staff Attorney

November 7, 2018