



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Carmen Parish
Complainant

Complaint No. 2017-125

v.

City of Trenton (Mercer)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 did not bear her burden of proof that she timely responded to the Complainant’s May 15, 2017 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 dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully denied access to the Complainant’s May 15, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that all responsive records were disclosed to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
3. The Custodian’s failure to timely respond to the request resulted in “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided the Complainant with the responsive records. 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 30th Day of July 2019

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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Carmen Parish¹
Complainant**

GRC Complaint No. 2017-125

v.

**City of Trenton (Mercer)²
Custodial Agency**

Records Relevant to Complaint: Electronic and hardcopies of: “[I]nspection reports and notes, violation reports and notes, certificate occupancies, and health reports and notes pertaining to 201 North Willow St., Trenton, NJ 08618 (Block #4002, Lot #5) from January 5 to 5/12/17.”

Custodian of Record: Dina Allen³

Request Received by Custodian: May 15, 2017

Response Made by Custodian: N/A

GRC Complaint Received: June 1, 2017

Background⁴

Request:

On May 12, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On June 1, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that when she submitted her OPRA request, she was told that she would receive records within seven (7) business days. The Complainant contended that as of May 31, 2017, she did not receive a response from the Clerk’s Office or the City of Trenton (“City”) Inspections Department.

The Complainant contended that the denial was evidence that supported her claim that her landlords were in violation of the Certificate of Occupancy (“CO”) permit, and the requested

¹ No legal representation listed on record.

² At the time of request and SOI submission, represented by Lori E. Caughman, Assistant City Attorney (Trenton, NJ).

³ The current Custodian of Record is Dwayne M. Harris.

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.

information would be the accompanying evidence. The Complainant asserted that the Clerk's Office and the City's Inspector refused to honor her request, requiring her to file the complaint at issue.

Responses:

On June 1, 2017, the twelfth (12th) business day after receipt, the Custodian responded to the Complainant via e-mail, providing fifty-nine (59) pages of records in response to the OPRA request. On June 2, 2017, the Custodian re-sent the response to the Complainant, requesting that the Complainant acknowledge receipt of the records. The Custodian then e-mailed the Complainant again, stating that she was getting a delivery error message in attempting to send the records electronically. The Custodian stated that as an alternative, hardcopies of the records could be picked up at the Clerk's Office for a charge of \$2.95 for copying costs.

On June 2, 2017, the Complainant responded to the Custodian, stating that she shouldn't have to file a Denial of Access Complaint to compel a response to her OPRA requests. The Complainant also asserted that the provided records were incomplete. The Complainant added that she wanted to know why the City allowed her landlord to rent her residence despite lacking a CO and failing to correct various other violations at the property.

On June 5, 2017, Counsel for the Custodian responded to the Complainant, first stating that the City was unable to answer her questions as OPRA was intended only to produce records by request. Counsel also asked the Complainant to clarify which records she believed were not provided as part of the City's response. That same day, the Complainant replied via e-mail, stating in part that the OPRA request at issue was not timely responded to by the Custodian until after she filed the instant complaint, and that she had not received all the requested information.

Statement of Information:⁵

On August 30, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 15, 2017. The Custodian certified that the request was forwarded via e-mail to the City's Inspections and Health Departments that same day. The Custodian then certified that she went on vacation while awaiting receipt of any located records. The Custodian certified that upon her return she responded via e-mail on June 1, 2017, attaching fifty-nine (59) pages of records.

The Custodian asserted that attempts to determine what records were missing from the response were left unanswered by the Complainant. The Custodian also argued that the Complainant was seeking records under the control of the City's municipal court, which is not subject to OPRA.

The current Custodian also submitted a certification as a supplement to the SOI. The current Custodian certified that the Complainant submitted a new OPRA request on July 26, 2017. The current Custodian certified that as part of the response to this new request, the responsive documents from the OPRA request at issue were included.

⁵ The Complaint was referred to mediation on June 23, 2017. The Complaint was referred back from mediation on August 23, 2017.

The current Custodian also certified that he activated the e-mail feature that confirms receipt of e-mail delivery and enables records viewing. Through that capability, the Custodian certified that the Complainant accessed and downloaded the responsive records several times, according to records accompanying his certification.

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).⁶ 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).

Here, the Custodian acknowledged receipt of the OPRA request on May 15, 2017. Thus, the deadline to respond was the end of business on May 24, 2017. However, the Custodian admitted that the response was not provided until June 1, 2017, as she was on vacation while the response was pending.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's May 15, 2017 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.

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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the

⁶ 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.

lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant's OPRA request sought inspection reports, violation reports, and various other records pertaining to a residential property from January 5, 2017 to the date of the request. On June 1 and 2, 2017, the Custodian responded via e-mail disclosing fifty-nine (59) pages of records. In subsequent correspondence, the Complainant contended that the City's response was incomplete.

In the SOI, the Custodian certified that the Complainant was asked to clarify what documents were missing from the City's response, but no answer was provided. Additionally, the current Custodian certified that the responsive records were provided again to the Complainant as part of a subsequent OPRA request.

Upon review of the evidence of record and arguments submitted by the parties, the GRC is satisfied that the Custodian provided all responsive records. While the Complainant asserted that the City's response was incomplete, she did not elaborate on what specific documents were missing despite being asked multiple times by the Custodian's Counsel. Moreover, there is no other evidence in the record that refutes the original and current Custodians' certifications that responsive records were provided.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully denied access to the Complainant's May 15, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that all responsive records were disclosed to the Complainant. Danis, GRC 2009-156, *et seq.*

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 timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided the Complainant with the responsive records. 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 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 May 15, 2017 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 dated October 31, 2007).
2. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully denied access to the Complainant's May 15, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that all responsive records were disclosed to the Complainant. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
3. The Custodian's failure to timely respond to the request resulted in "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided the Complainant with the responsive records. 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: Samuel A. Rosado
Staff Attorney

July 23, 2019