



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Eric Petr
Complainant

Complaint No. 2017-97 and 2017-98

v.

Town of Morristown (Morris)
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s April 6, 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s March 30, 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 October 31, 2007).
3. The Custodian’s failure to respond to the March 30, 2017 OPRA request until thirty-one business days after receipt resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s failure to respond to the April 6, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately did respond to both requests either denying access or providing records on a memory stick. Further, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious



wrongdoing or were intentional and deliberate. Therefore, the Custodian actions did 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 18th Day of December, 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: December 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Eric Petr¹
Complainant**

GRC Complaint No. 2017-97 and 2017-98

v.

**Town of Morristown (Morris)²
Custodial Agency**

Records Relevant to Complaint:

March 30, 2017 OPRA request:³ Electronic copies via e-mail of vehicle maintenance records and associated costs for maintenance of all Town of Morristown (“Town”) Bureau of Police vehicles from January 1, 2006 through March 30, 2017.

April 6, 2017 OPRA request:⁴ Electronic copies via e-mail of every Police “outside work contract” for every Town officer from January 1, 2006 through April 6, 2017.

Custodian of Record: Kevin Harris⁵

Request Received by Custodian: March 30, 2017; April 6, 2017

Response Made by Custodian: May 15, 2017; May 2, 2017

GRC Complaint Received: May 2, 2017

Background⁶

Request:

On March 30, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On April 6, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. The Complainant noted that he previously submitted the OPRA request on March 16, 2017.

¹ No legal representation listed on record.

² Represented by Vijayant Pawar, Esq., of Pawar, Gilgallon & Rudy, LLC (Morristown, NJ). Previously represented by Joni Noble McDonnell, Esq., of Inglesino, Webster, Wyciskala & Taylor (Parsipanny, NJ).

³ This request is the subject of GRC 2017-97.

⁴ This request is the subject of GRC 2017-98.

⁵ The current Custodian of Record is Margot Kaye.

⁶ 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.

Denial of Access Complaint:

On May 2, 2017, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant contended that the Custodian failed to respond to either request, which sought budgetary items subject to immediate access. The Complainant asserted that he wanted immediate access to the information sought.

Response

GRC 2017-97

On May 15, 2017, the thirty-first (31st) business day after receipt of the OPRA request, the Custodian responded in writing denying the request as invalid because it failed to seek identifiable records. Citing Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007).

GRC 2017-98

On May 2, 2017, the seventeenth (17th) business day after receipt of the OPRA request, the Custodian responded in writing seeking an extension of ten (10) business days to respond to the request. On June 2, 2017, the Custodian again responded advising that a memory stick containing over 215 items was prepared because sending the records via e-mail would be prohibitive. On the same day, the Complainant retrieved the memory stick from the Town and acknowledged receipt.

Statement of Information:

On June 20, 2018, the Custodian filed Statements of Information (“SOI”) for both complaints.

GRC 2017-97

The Custodian certified that he received the Complainant’s OPRA request on March 30, 2017. The Custodian certified that he responded in writing on May 15, 2017 denying access to the request as invalid.

The Custodian contended that he properly denied access to the March 30, 2017 OPRA request because it was invalid. The Custodian contended that the request sought information, as opposed to an identifiable “government record.” The Custodian contended that the Council routinely upheld denials where the complainant sought information. Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

GRC 2017-98

The Custodian certified that he received the Complainant’s OPRA request on April 6, 2017. The Custodian certified that he initially responded in writing on May 2, 2017 seeking ten (10)

additional business days to respond. The Custodian certified that he again responded on June 2, 2017 granting access to the responsive records on a memory stick. The Custodian certified that the Complainant retrieved the memory stick on the same day.

The Custodian contended that no denial of access occurred because the Complainant received all records that existed on a memory stick on June 2, 2017. The Custodian noted that the responsive records comprised of over 215 items amounting to 925 megabytes. The Custodian noted that the voluminous nature of the request delayed production beyond the extended time frame.

Analysis

Immediate Access

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).⁷ 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).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁸ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of immediate access records).

Here, the Complainant's March 30, 2017 OPRA request sought "vehicle maintenance records and associated costs" for police vehicles over an eleven-year period. This OPRA request does not appear to directly identify any type of records for which "immediate access" is required under N.J.S.A. 47:1A-5(e). For this reason, it is reasonable that the Custodian would not have recognized that this request required an immediate response.

⁷ 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.

⁸ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

However, the Complainant's April 6, 2017 OPRA request sought "outside work contracts." Such contracts are categorically considered records subject to "immediate access." N.J.S.A. 47:1A-5(e). The evidence of record indicates that the Custodian did not initially respond to the Complainant's request until May 2, 2017, the seventeenth (17th) business day following receipt of the request, seeking an extension.⁹ The Custodian had "an obligation to immediately" respond to a Complainant granting access, denying access, seeking clarification, or requesting an extension time, but failed to do so. See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013); Kaplan v. Winslow Twp. Bd. of Educ. (Camden), GRC Complaint No. 2011- 237 (Interim Order dated December 18, 2012).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's April 6, 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 immediately, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody, GRC 2005-98; Herron, GRC 2006-178; Harris, GRC 2011-65.

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).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, GRC 2007-11.

Having determined that the Complainant's March 30, 2017 OPRA request did not reasonably seek access to "immediate access" records, the GRC now turns to whether the request was nonetheless "deemed" denied. In the SOI, the Custodian certified that he received the request on March 30, 2017. The Custodian further affirmed that he responded to the request on May 15, 2017 denying it as invalid.¹¹ The GRC has calculated the response time at thirty-one (31) business days, clearly well beyond the statutory time frame. Thus, the evidence of record supports that the March 30, 2017 OPRA request was "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's March 30, 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,

⁹ The GRC notes that the Custodian ultimately provided access to responsive records on June 2, 2017.

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.

¹¹ The GRC does not address Custodian's denial of access based on the validity of the subject OPRA request because the issue was not raised by the Complainant at any point during the pendency of these complaints.

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.

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 March 30, 2017 OPRA request until thirty-one business days after receipt resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s failure to respond to the April 6, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately did respond to both requests either denying access or providing records on a memory stick. Further, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian actions did 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 his burden of proof that he timely responded to the Complainant’s April 6, 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 immediately, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007); Harris v. NJ Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s March 30, 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 October 31, 2007).
 3. The Custodian’s failure to respond to the March 30, 2017 OPRA request until thirty-one business days after receipt resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian’s failure to respond to the April 6, 2017 OPRA request immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e). However, the Custodian ultimately did respond to both requests either denying access or providing records on a memory stick. Further, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian actions did 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

December 11, 2018