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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 12, 2019 Government Records Council Meeting

Elana Knopp
Complainant

Complaint No. 2018-04

v.

City of Newark (Essex)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 November 9, 2017 OPRA request seeking contracts. 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. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). Additionally, with respect to the non-immediate access portions of the Complainant’s November 9, 2017 OPRA request, although the Custodian timely responded in writing seeking an extension of time, he failed to respond within the extended period resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian’s response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015).
3. The Custodian’s failure to locate responsive records until after he conducted an additional search following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant’s OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure



of those records because the Custodian disclosed same to the Complainant on January 11, 2018.

4. The Custodian violated 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), provided an insufficient response pursuant to Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), and conducted an insufficient search pursuant to Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, following receipt of the complaint, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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 12th Day of November 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: November 15, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Elana Knopp¹
Complainant**

GRC Complaint No. 2018-4

v.

**City of Newark (Essex)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of: “any and all documentation regarding any contracts, agreements, communications and any documentation between the City of Newark [“City”] and Elite Strategies/Elite Strategies, LLC [“ES”] between 1/1/2013 and 11/5/2017 between the Mayor’s office, administration (B.A.) and [ES].”

Custodian of Record: Kenneth Louis

Request Received by Custodian: November 9, 2017

Response Made by Custodian: November 15, 2017; December 19, 2017

GRC Complaint Received: January 9, 2018

Background³

Request and Response:

On November 9, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 15, 2017, the third (3rd) business day after receipt, the Custodian responded in writing stating that an extension of time to until December 4, 2017 was needed to fulfill the request.

On December 5, 2017, the Complainant sent an e-mail to Ana Golinski, stating that she was told to expect a response to her OPRA request on December 4, 2017, but none was received. The Complainant stated that if she did not receive a response by December 7, 2017, she would file a complaint.

On December 19, 2017, Ms. Golinski, on behalf of the Custodian, responded in writing stating that no contract or agreements existed between ES and the City.

¹ No legal representation listed on record.

² Represented by Kenyatta Stewart, Esq. (Newark, 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 January 9, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on December 4, 2017, she reached out to the Custodian via telephone as to the status of the request and was told that the request was not ready. The Complainant then stated that she e-mailed the City Clerk’s office the next day stating that if she did not receive a response by December 7, 2017, she would file a Denial of Access Complaint. The Complainant asserted that she received no response from the Custodian until December 19, 2017, where the Custodian asserted that no responsive records exist.

The Complainant asserted that this is a denial of access because a news article dated November 25, 2017 identified ES as providing services to the City, yet was told by the Custodian that no contracts existed between ES and the City during the identified period.

The Complainant asserted that she was submitting this complaint due to the time taken to respond, as well as denying access to records that should exist based on the news article.

Statement of Information:

On February 7, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 9, 2017. The Custodian certified that he responded in writing on November 15, 2017, stating that an extension of time was needed. The Custodian’s SOI included a certification from Ms. Golinski, wherein she certified that she directly handled the Complainant’s OPRA request. Ms. Golinski certified that she forwarded the request to the BA’s Office and the Mayor’s Office on November 16, 2017. She then certified that the request was also forwarded to the City Clerk’s Office (“CCO”), Records Management section. Ms. Golinski certified that on or about November 22, 2017, Carol Warren, a staff member with the CCO, obtained a response from the Manager of Records Management, who stated that they could not locate any records of a contract with ES authorized by the City.

Ms. Golinski then certified that on December 4, 2017, Ms. Warren received a phone call from the Complainant inquiring on the status of her request. She certified that Ms. Warren reached out to Michael Greene, Assistant Business Administrator, requesting an update on Ms. Golinski’s behalf. Ms. Golinski certified that after a conversation amongst various individuals, Mr. Greene and Business Administrator Jack Kelly both stated that they did not have any responsive documents or correspondence.

Ms. Golinski certified that on December 5, 2017, Soraida Lara, another CCO employee, received a phone call from the Complainant seeking a status update. Ms. Golinski certified that Ms. Lara sent an e-mail to Deputy City Clerk Kathleen Marchetti (“Deputy Clerk”), informing that the Complainant had contacted her regarding the request. Ms. Golinski certified that additional conversations took place between the CCO and the BA’s Office seeking a response to the request.

Ms. Golinski then certified that on December 19, 2017, she sent an e-mail to the Complainant, stating that no records existed for any contract with ES authorized by the City.

Ms. Golinski certified that on January 9, 2018, she received an e-mail from the Complainant, where she included an excerpt from a news article dated November 25, 2017, where it was asserted that ES provided services to the City on three (3) occasions between September 2014 and December 2015. The Complainant stated that considering claims within the article, she questioned the City's response. Ms. Golinski certified that she forwarded the Complainant's e-mail to the Custodian and the Deputy Clerk that same day, noting that while she obtained a response from Records Management, she did not receive responses from the Mayor's Office or the BA's Office on whether they had responsive records. Ms. Golinski affirmed that she requested assistance from the recipients on obtaining said responses.

Ms. Golinski certified that on January 10, 2018, the City's Finance Unit performed a search for records based upon the article. Ms. Golinski certified that the Deputy Clerk obtained printouts from the Finance Unit which reflected payments made to ES. Ms. Golinski certified that the Deputy Clerk forwarded the printouts to the Assistant Business Administrator and requested the purchase orders and any accompanying documents from the identified payments. Ms. Golinski then certified that on or about January 11, 2018, she received a response from the Mayor's Office, which included copies of four (4) vouchers considered responsive to the request.

Ms. Golinski certified that on January 11, 2018, she provided a supplemental response to the Complainant, enclosing the records received by the Mayor's Office that same day.

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).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).

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).⁵ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005)

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.

⁵ 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).

and Harris v. N.J. 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 November 9, 2017 OPRA request sought in part contracts between ES and the City. Contracts are explicitly considered "immediate access" records under OPRA. N.J.S.A. 47:1A-5(e). The evidence in the record demonstrates that the Custodian did not respond to the Complainant's request until November 15, 2017, the third (3rd) business day following receipt, seeking an extension of time. The Custodian had "an obligation to immediately" respond to the 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).

Additionally, in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013), the custodian timely responded in writing on the fifth (5th) business day after receiving the complainant's OPRA request, seeking five (5) additional days to respond. However, the custodian failed to respond within the additional time requested. Therefore, the Council held that that there was a "deemed" denial of access under N.J.S.A. 47:1A-5(i).

Regarding the Complainant's OPRA request portion seeking non-immediate access records, the Custodian timely responded on November 15, 2017, seeking an extension of time to until December 4, 2017. However, the Custodian failed to respond within the extended time. The record shows that Ms. Golinski did not respond to the Complainant's request until December 19, 2017, eleven (11) business days after the end of the extended deadline.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's November 9, 2017 OPRA request seeking contracts. 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. Additionally, with respect to the non-immediate access portions of the Complainant's November 9, 2017 OPRA request, although the Custodian timely responded in writing seeking an extension of time, he failed to respond within the extended period resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn, GRC 2011-326.

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that "...[t]he Custodian's response was legally insufficient because he failed to respond to each request item individually." Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

In Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian's response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian "completely failed to acknowledge or address the balance of the request."

In the instant matter, the Complainant's OPRA request sought contracts, agreements, and communications between ES and the City during a designated period. In the Custodian's December 19, 2017 response, Ms. Golinski stated that no records were located regarding any contracts with ES authorized by the City. Ms. Golinski did not address the request's portions seeking agreements or communications. In accordance with Graumann, 2014-314, the evidence in the record demonstrates that the Custodian's response was insufficient.

Therefore, the Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Graumann, 2014-314.

Sufficiency of Search

It is the custodian's responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian's response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant's OPRA request existed. The custodian certified that after receipt of the complainant's denial of access complaint, which contained e-mails responsive to the complainant's request, the custodian conducted a second search and found records responsive to the complainant's request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian initially responded to the Complainant's OPRA request on December 19, 2017, stating that no responsive records exist. Thereafter on January 9, 2018, in addition to filing her Denial of Access Complaint, the Complainant provided the Custodian an excerpt and link to a news article wherein it stated that ES provided services to the City on several occasions during the requested date range. Ms. Golinski, on behalf of the Custodian, then requested an additional search from the City's Mayor's Office and BA's Office. Ms. Golinski certified that she received printouts and copies of four (4) vouchers reflecting payments from the City to ES. Ms. Golinski certified that she provided those records to the Complainant on January 11, 2018, and considered the request fulfilled. Thus, in accordance with Schneble, GRC 2007-220, the evidence in the record supports that the Custodian's initial search was insufficient.

Therefore, the Custodian's failure to locate responsive records until after he conducted an additional search following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6;

Schneble, GRC 2007-220. However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on January 11, 2018.

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 violated 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), provided an insufficient response pursuant to Graumann, 2014-314, and conducted an insufficient search pursuant to Schneble, GRC 2007-220. However, following receipt of the complaint, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s November 9, 2017 OPRA request seeking contracts. 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. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). Additionally, with respect to the non-immediate access portions of the Complainant's November 9, 2017 OPRA request, although the Custodian timely responded in writing seeking an extension of time, he failed to respond within the extended period resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian's response was insufficient because he failed to respond in writing to each individual item contained in the OPRA request. Accordingly, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
 3. The Custodian's failure to locate responsive records until after he conducted an additional search following receipt of the Denial of Access Complaint, resulted in an insufficient search. Thus, the Custodian unlawfully denied access to the additional records responsive to the Complainant's OPRA request located in connection with the second search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, the GRC declines to order disclosure of those records because the Custodian disclosed same to the Complainant on January 11, 2018.
 4. The Custodian violated 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), provided an insufficient response pursuant to Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015), and conducted an insufficient search pursuant to Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008). However, following receipt of the complaint, the Custodian disclosed to the Complainant all responsive records to the request located via the additional search. 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

October 30, 2019