



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 15, 2020 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2019-159

v.

County of Essex
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original 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 extended time frame results in a “deemed” denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the GRC declines to take any further action because the original Custodian ultimately responded on August 20, 2019 disclosing the only responsive record that existed.
2. The original Custodian’s failure to timely respond within the extended time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the original Custodian ultimately disclosed to the Complainant the only responsive record that existed on August 20, 2019. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 15th Day of December 2020

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 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2019-159

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of the following based on a July 7, 2019 Star Ledger article:

1. “All documents delineating all communications” between the County of Essex (“County”) and the State of New Jersey wherein the former sought \$7 million in funding from the latter.
2. “All documents delineating the reason(s)” the County provided to the State to justify the funding request.
3. “All documents” between the County and United States Department of Agriculture “wherein the County [Supplemental Nutrition Assistance Program (“SNAP”)] above cited funding request of the State is delineated.”

Custodian of Record: Olivia Schumann, Esq.³

Request Received by Custodian: July 9, 2019

Response Made by Custodian: July 9, 2019

GRC Complaint Received: August 9, 2019

Background⁴

Request and Response:

On July 9, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the original Custodian responded in writing seeking clarification of the subject OPRA request. The original Custodian asked the Complainant to provide names and titles or departments, dates, subject or content, and type of communications sought. The Complainant responded identifying nine (9)

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The original “Custodian of Record” was Valentina Smoot Palchetti.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

individuals, a date range of June 1, 2019 to present, and the subject/content of “\$7 million SNAP administration funding.” On July 16, 2019, the original Custodian responded in writing obtaining an extension of time through August 1, 2019.

Denial of Access Complaint:

On August 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his OPRA request was denied as of August 1, 2019.

Supplemental Response:

On August 20, 2019, the original Custodian responded in writing disclosing a November 30, 2018 State House Agenda and stating that no additional records existed.

Statement of Information:⁵

On January 15, 2020, the Custodian filed a Statement of Information (“SOI”) attaching three (3) legal certifications. The Custodian certified that the County received the Complainant’s OPRA request on July 9, 2019. The Custodian noted that because she was not the County’s “custodian of record” at the time of the OPRA request, she did not know the search the original Custodian undertook. The Custodian certified that the original Custodian responded in writing on July 9, 2019 (seeking clarification), July 16, 2019 (obtaining an extension of time), and August 20, 2019 (disclosing a record).

The Custodian contended that although she was not the “custodian of record” who handled the subject OPRA request, it is the County’s position that no unlawful denial of access occurred. The Custodian stated that Chief Financial Officer Hossam Mohamed certified that a staff member obtained the November 30, 2018 agenda from the Treasury and uploaded it to the County’s OPRA Portal on July 18, 2019. See Mohamed Cert. ¶ 4-5. The Custodian further averred that neither the Department of Citizen Services nor the Office of Public Information maintained any responsive records. See Fusco Cert. ¶ 4; Puglisi Cert. ¶ 4.

The Custodian stated that the GRC has routinely held that no unlawful denial of access occurred where custodians certify that they provided all records that existed. Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Owens v. Mt. Holly Twp. (Burlington), GRC Complaint No. 2013-233 (February 2014) (citing Burns, GRC 2005-68; Cole v. Twp. of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012); and Valdes v. Twp. of Belleville (Essex), GRC Complaint No. 2012-181 (June 2013)). The Custodian asserted that here, the County has produced three (3) certifications from those individuals that conducted a search for responsive records. The Custodian stated that taken together, the County disclosed the only record responsive to the subject OPRA request and no other records existed. The Custodian thus contended that the GRC should render a finding consistent with the cited case law: no

⁵ On August 20, 2019, this complaint was referred to mediation. On December 30, 2019, this complaint was referred back to the GRC for adjudication.

unlawful denial of access occurred on the basis that the County disclosed the only responsive record that existed.

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 October 31, 2007).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Custodian initially responded on July 16, 2019, the fifth (5th) business day after receiving clarification from the Complainant, obtaining an extension of time through August 1, 2019 to respond to the OPRA request. However, the original Custodian did not respond again until August 20, 2019, or thirteen (13) business days after the expiration of the extended time frame and after the filing of this complaint. Thus, in keeping with Kohn, GRC 2007-124, the original Custodian's failure to respond prior to the extension expiration resulted in a "deemed" denial.

Therefore, the original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original

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.

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 extended time frame results in a "deemed" denial of said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. Notwithstanding, the GRC declines to take any further action because the original Custodian ultimately responded on August 20, 2019 disclosing the only responsive record that existed.

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 original Custodian's failure to timely respond within the extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the original Custodian ultimately disclosed to the Complainant the only responsive record that existed on August 20, 2019. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original 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 extended time frame results in a "deemed" denial of said 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). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Notwithstanding, the GRC declines to take any further action because the original Custodian ultimately responded on August 20, 2019 disclosing the only responsive record that existed.

2. The original Custodian's failure to timely respond within the extended time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the original Custodian ultimately disclosed to the Complainant the only responsive record that existed on August 20, 2019. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Frank F. Caruso
Executive Director

December 8, 2020