



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Robert Scutro
Complainant

Complaint No. 2019-167

v.

City of Linden (Union)
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 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). However, the GRC declines to order any further action because the Custodian cured this issue on September 23, 2019, and the Complainant has not challenged that response.
2. The Custodian’s failure to timely respond 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 Custodian ultimately produced the responsive records on September 29, 2019. 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 23rd Day of February 2021

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: February 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Robert Scutro¹
Complainant**

GRC Complaint No. 2019-167

v.

**City of Linden (Union)²
Custodial Agency**

Records Relevant to Complaint:

1. All letters or e-mails sent to Dan Antonelli by Chasen, Lamparello, Mallon & Cappuzzo (“the Firm”) from March 6, 2019 to May 12, 2019 pertaining to case No. UNN-L-3776-13.
2. All letters sent to the Complainant by the Firm by regular and certified mail related to case No. UNN-L-3776-13.
3. The cost of postage on each letter.
4. The cost of postage for each mailed to the Complainant with court documents enclosed.
5. The detail billing pertaining to case No. UNN-L-3776-13.
6. The detail billing on the cost for the Firm to prepare the documents and sent to the City of Linden (“City”) on the previous and current OPRA request.

Custodian of Record: Jennifer Honan
Request Received by Custodian: June 18, 2019
Response Made by Custodian: N/A
GRC Complaint Received: August 16, 2019

Background³

Request and Response:

On June 7, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 9, 2019, the Custodian informed the Complainant that she was awaiting a response from the City Attorney as to the existence of responsive records.⁴

¹ No legal representation listed on record.

² Represented by Daniel Antonelli, Esq., Municipal Attorney (Linden, N.J.).

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.

⁴ It is not known from the record whether this communication between the parties was in writing.

Denial of Access Complaint:

On August 16, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he failed to receive a response from the Custodian after being told that his request had been forwarded to the City Attorney. The Complainant requested that action be taken against the City Attorney and the City (“City”) itself and require compliance with OPRA.

Statement of Information:

On September 23, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 18, 2019. The Custodian certified that her search included forwarding the request to the City Attorney on June 20, 2019. The Custodian certified that she sent a follow-up message to the City Attorney on August 7, 2019. The Custodian certified that on that same day, the City Attorney provided seven (7) e-mails containing various records that may be responsive to the Complainant’s request.

The Custodian asserted that the records were never provided to the Complainant. The Custodian asserted that her office has received 879 OPRA requests as of September 23, 2019, and thirteen (13) were submitted by the Complainant. The Custodian asserted that the Complainant’s requests sought the same records that have been supplied to him previously. The Custodian also asserted that the Complainant had three (3) OPRA requests pending at the same time and contributed to the oversight. The Custodian asserted that the records were provided as attached to the SOI.

Additional Submissions:

On September 24, 2019, the Complainant submitted a response to the Custodian’s SOI. The Complainant disputed the claim that he previously requested the records at issue in this matter and requested evidence of the claim. The Complainant also asserted that the Custodian failed to timely respond to each of the three (3) OPRA requests to which she referred in the SOI. The Complainant stated that the Custodian either improperly responded or partially responded to the other requests.

On September 24, 2019, the Complainant submitted correspondence to the GRC, stating that he submitted an OPRA request to the Custodian requesting prior OPRA requests he submitted where he sought similar records as the ones at issue.

On October 7, 2019, the Complainant submitted correspondence to the GRC, providing a copy of the Custodian’s response to the OPRA request submitted on September 24, 2019. The Complainant maintained that he never requested the same records at issue in previous OPRA requests and asserted that the Custodian committed perjury in the SOI.

On November 25, 2019, the GRC received additional correspondence from the Complainant. The Complainant provided copies of his OPRA requests submitted in 2018 and 2019, and asserted that they did not seek the same or similar records as those at issue.

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).⁵ 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).

In the matter before the Council, the Complainant contended that the Custodian failed to respond to his OPRA request. In the SOI, the Custodian certified that she received the OPRA request on June 18, 2019 and forwarded the request to the City Attorney to locate responsive records. The Custodian further certified that on August 7, 2019, she received responsive records from the City Attorney, but failed to deliver them to the Complainant. The Custodian certified that the oversight was due to her office receiving hundreds of OPRA requests, including several from the Complainant. The Custodian certified that she provided the Complainant with the responsive records simultaneously with the SOI on September 23, 2019. Notwithstanding the Custodian's claims regarding the Complainant's previous OPRA requests, the failure to timely respond resulted in a "deemed" denial of access.

Therefore, the 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 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. However, the GRC declines to order any further action because the Custodian cured this issue on September 23, 2019, and the Complainant has not challenged that response.

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

⁵ 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.

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’s failure to timely respond 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 Custodian ultimately produced the responsive records on September 29, 2019. 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 her burden of proof that she timely responded to the Complainant’s 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). However, the GRC declines to order any further action because the Custodian cured this issue on September 23, 2019, and the Complainant has not challenged that response.
2. The Custodian’s failure to timely respond 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 Custodian ultimately produced the responsive records on September 29, 2019. 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

February 16, 2021