



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Robert Scutro
Complainant

Complaint No. 2019-179

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).
2. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the portion of the Complainant’s OPRA request seeking a “full detail” of each case handled by the Firm within a certain period. N.J.S.A. 47:1A-6. Specifically, the Complainant sought information and failed to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
3. Notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the remainder of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant the only responsive records that the City possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); 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)

4. 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 cured the response issue on June 19, 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. 2019-179

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of “[a]ll cases handled by the firm of Chasan Lamparello Mallon & Cappuzzo, P.C. (“Firm”). From September 1, 2009, to April 30, 2019. Please include a full detail of each case and itemized billing for each case.”

Custodian of Record: Jennifer Honan
Request Received by Custodian: April 30, 2019
Response Made by Custodian: June 19, 2019
GRC Complaint Received: August 26, 2019

Background³

Request and Response:

On April 30, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 19, 2019, the thirty-seventh (37th) business day after receipt, the Custodian responded in writing providing Firm Invoice Reports (“FIRs”) and a Financial Transaction Log (“FTL”) to the Complainant. The Custodian stated that redactions were made to the records in accordance with OPRA’s privacy interest and personal identifying information provisions. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On August 26, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the disclosed records did not “detail” each case, nor did any of the listed cases involve the City of Linden (“City”). The Complainant argued that the cases pertained to North Bergen or other municipalities. The

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.

Complainant contended that the OPRA request was submitted to the City and therefore should have identified cases involving same, and not other municipalities.

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 April 30, 2019. The Custodian certified that her search included forwarding the request to the City’s Law Department and Insurance Commission Secretary (“ICS”) to search for responsive records. The Custodian certified that on May 7, 2019, she received an e-mail from ICS with responsive records to the Custodian. The Custodian also certified that ICS informed her that no itemized bills were found in its computer system. The Custodian certified that she responded to the Complainant in writing on June 19, 2019, providing responsive records.

The Custodian did not address why the records were not submitted to the Complainant until the thirty-seventh (37th) business day after receipt, nor did the Custodian elaborate on the records production.

Additional Submissions:

On September 23, 2019, the Complainant responded to the Complainant’s SOI, maintaining that the request was submitted to the City, and therefore should have produced records pertaining to same.

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).

In the matter before the Council, the Custodian certified that she received the OPRA request on June 18, 2019 and forwarded the request to the City’s Law Department and ICS to locate responsive records. The Custodian further certified that on May 7, 2019, she received responsive records from ICS, but failed to deliver them to the Complainant until June 19, 2019, thirty-seven (37) business days after receipt of the OPRA request. Furthermore, there is no

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.

evidence in the record that the Custodian sought an extension to respond to the request or give a reason for the delay. Thus, 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.

Validity of Request

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁵ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff’d, 24 N.J. 139 (1957).

The New Jersey Appellate Division has held that:

⁵ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Twp. Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ N.J. Builders Ass’n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) because it fails to identify specific records, thus requiring a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

rather than an identifiable government record, the request is invalid pursuant to [MAG] . . .” Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Here, the Complainant requested a “full detail” of each case handled by the Firm as part of his OPRA request. Like the request in LaMantia, the Complainant is not seeking government records, but rather information on each case identified by the Custodian. Attempting to fulfill this portion of the request would require the Custodian to conduct research by reviewing and summarize the files pertaining to each located case, a task which she is not obligated to conduct. MAG, 375 N.J. Super. at 534.

Therefore, notwithstanding the Custodian’s “deemed” denial, she did not unlawfully deny access to the portion of the Complainant’s OPRA request seeking a “full detail” of each case handled by the Firm within a certain period. N.J.S.A. 47:1A-6. Specifically, the Complainant sought information and failed to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler, GRC 2007-151; LaMantia, GRC 2008-140.

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 No. 2009-156, *et seq.* (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 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 this matter, the Custodian disclosed FIRs and an FTL from the Garden State Joint Insurance Fund to the Complainant. The Complainant filed the instant complaint contending that the records were not responsive to his request, as they pertained to matters involving other municipalities and not the City. Furthermore, the Complainant stated that the records lacked detail. In the SOI, the Custodian included correspondence from ICS, who stated that itemized billing statements did not exist.

In reviewing the evidence of record here, the GRC is satisfied that the Custodian did not unlawfully deny access to the subject OPRA request. Although the Complainant asserted that the FIRs did not pertain to the City, it should be noted that the Complainant’s OPRA request did not specify matters the Firm handled with the City as a party. Notwithstanding, a review of the FIRs indicates that pages 2, 6, 9, and 15 listed matters in which the Firm billed for services representing the City. Furthermore, the provided FTL also specifically pertained to the City. The Custodian also

certified that no itemized bills exist in response to the OPRA request. Thus, the GRC finds that there is no evidence on the record that refutes the Custodian's certification.

Therefore, notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the remainder of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant the only responsive records that the City possessed. Danis, GRC 2009-156, *et seq.*; Burns, 2005-68; Holland, 2014-63, *et seq.*⁷

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 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 cured the response issue on June 19, 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.

⁷ The GRC does not address the redactions contained in the responsive records because they were not raised by the Complainant at any point during the pendency of this complaint.

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).
2. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the portion of the Complainant's OPRA request seeking a "full detail" of each case handled by the Firm within a certain period. N.J.S.A. 47:1A-6. Specifically, the Complainant sought information and failed to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009); LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
3. Notwithstanding the Custodian's "deemed" denial, she did not unlawfully deny access to the remainder of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed to the Complainant the only responsive records that the City possessed. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); 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)
4. 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 cured the response issue on June 19, 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 13, 2021