



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 30, 2023 Government Records Council Meeting

Arthur J. Rittenhouse, Jr.
Complainant

Complaint No. 2021-33

v.

Borough of Sayreville (Middlesex)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 October 31, 2007).
2. The Custodian’s failure to safeguard the requested Water Department camera site video from destruction on November 30, 2020, following the Complainant’s November 18, 2020 OPRA request for the record, resulted in spoliation of responsive records. As such, this complaint should be referred to the Office of Administrative Law for a hearing to determine whether the Custodian, or any other Borough official, knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. See Madlinger v. Berkeley Twp. Police Dep’t (Ocean), 2020-90 (Interim Order March 29, 2022).

Interim Order Rendered by the
Government Records Council
On The 30th Day of May 2023

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: June 5, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Arthur J. Rittenhouse, Jr.¹
Complainant**

GRC Complaint No. 2021-33

v.

**Borough of Sayreville (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies on separate compact discs “. . . of the camera tapes filming the Middlesex County Board of Elections Drop Boxes located behind Sayreville Borough Hall and at the Sayreville Water Department on Bordentown Ave. The dates should be as follow (sic):

Sayreville Borough Hall[:] From start of filming ballots being deposited for November 3, 2020 General Election to 5 p.m. on November 5, 2020[.] Sayreville Water Department[:] From start of filming ballots being deposited for the November 3, 2020 General Election to 8:30 p.m. November 3, 2020[.]”

Custodian of Record: Jessica Morelos
Request Received by Custodian: November 18, 2020
Response Made by Custodian: None in writing
GRC Complaint Received: January 29, 2021

Background³

Request and Responses:

On November 5, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records, which the Custodian certified she received on November 18, 2020.

On November 30, 2020, the Custodian e-mailed the Complainant asking him to confirm a conversation with the Borough attorney to the effect that he wanted to put the OPRA request on hold. On that same date, the Complainant sent a reply e-mail confirming that he was “. . . putting

¹ No legal representation listed on record.

² Represented by Michael DuPont, Esq., of McKenna, DuPont, Higgins & Stone (Red Bank, 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.

the OPRA request on hold . . .” The Complainant stated that he would let the Custodian know if he wished to proceed with the request.

On December 4, 2020, the Complainant e-mailed the Custodian and Counsel to advise them that he learned from the GRC that they could not charge him a fee for electronic records; however, they could charge a fee for hardware such as diskettes and flash drives.

On December 15, 2020, the Custodian e-mailed the Complainant to inform him that she was informed by the Borough’s IT Manager that for the Borough Hall camera site the estimated cost to provide the video recordings would be \$575.00, which would comprise six hours of labor at \$75.00 per hour and \$125.00 for a 4 terabyte external hard drive. The Custodian stated that the Custodian’s Counsel would call him regarding the other camera site.

On December 21, 2020, the Complainant e-mailed the Custodian to ask if he could view the video recordings to verify that they were clear enough to meet his needs. Two hours later, the Custodian sent the Complainant a reply e-mail to inform him he could not view the videos due to “internal security concerns.” The Custodian also informed the Complainant that upon receipt of the \$575.00 charge, she would “. . . download the footage to a hard drive in accordance with [the Complainant’s] OPRA request.”

On January 21, 2021, the following e-mail thread ensued: At 9:45 a.m., the Complainant e-mailed the Custodian to inform her he would proceed with the purchase of the camera video recordings. The Complainant stated that because he had not heard from the Custodian’s Counsel regarding the Water Department camera site, he would drop off a check later this date for the requested \$575.00. The Complainant stated that the \$575.00 should be sufficient to cover the cost for recordings from both of the requested camera sites. At 12:29 p.m., the Custodian’s Counsel e-mailed the Complainant to inform him that the vendor responsible for the camera at the Water Department camera site recorded over the requested video recording because “. . . the requested footage has well surpassed the archives of the device . . .” At 1:15 p.m., the Complainant e-mailed the Custodian’s Counsel and stated that when he made his request, he asked that the recordings be preserved. He stated that the Borough destroyed records that were sought in the OPRA request. The Complainant stated that he wanted the Custodian to continue with the disclosure of the Borough Hall camera site video. At 1:23 p.m., the Custodian’s Counsel e-mailed the Complainant, informing him that the Custodian was instructed to “. . . proceed to recover items requested via this email.”

Denial of Access Complaint:

On January 29, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on November 5, 2020, he submitted his OPRA request to the Custodian. The Complainant stated that the Custodian’s Counsel informed him it would cost between \$1,000.00 and \$6,000.00 to have the videos copied for disclosure. The Complainant stated that he then contacted the GRC regarding the quoted cost and was informed that the Borough could only charge for time and material. The Complainant stated that, thereafter, he and the Custodian agreed on a charge of \$575.00. The Complainant stated that he also agreed “to hold the OPRA request so we did not go over the time limit for a response.”

The Complainant stated that he asked the Custodian if he could review the video recordings prior to submitting the \$575.00 and he was told he could not do so.

The Complainant stated that he waited from mid-December of 2020 until mid-January of 2021 for a response from the Custodian. After not receiving a response, the Complainant e-mailed the Custodian on January 21, 2021, and informed her that he would proceed with the purchase of the video recordings and would drop off a check for the \$575.00 charge. The Complainant stated that he was then informed by the Custodian's Counsel that the Water Department camera site video had been erased. The Complainant stated that, "[i]n my discussions with [Custodian's Counsel] I specifically requested the tapes not be erased and was assured that would not happen." The Complainant alleged that the Borough denied him access by destroying the Water Department camera site videos.

Statement of Information:

On February 23, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 18, 2020 and assigned it Borough Number 20-446. The Custodian certified that the records responsive to the request are videos from the Borough Hall drop box camera site and videos from the Water Department drop box camera site. The Custodian further certified that per the *New Jersey Guide to Ballot Drop Box* dated September 25, 2020 ("Guide"), the videos are considered election records and must be retained at minimum until the period to challenge the election results has passed. The Custodian attached to the SOI as Item 9B a copy of page 8 of the Guide and highlighted in yellow the following sentence: "These videos are considered an election record, and must be retained, at a minimum, until the period to challenge the election results has passed." The Custodian certified that the 2020 general election was certified by the Middlesex County Clerk on November 20, 2020, and the challenge period is 10 days following certification. As such, the Custodian certified that the videos can be reused starting November 30, 2020.

The Custodian certified that after the OPRA request was received, verbal conversations ensued between the Complainant, the Custodian, the IT Manager, and the Custodian's Counsel. The Custodian certified that thereafter, on November 30, 2020, she followed up with the Complainant, at which time he put the OPRA request on hold.

The Custodian stated that on December 4, 2020, she received communication that the initial cost figures to disclose records responsive to the OPRA request were inaccurate. The Custodian further certified that on December 8, 2020, she received from the IT Manager an updated cost to prepare the Borough Hall camera site video for disclosure. The Custodian stated that the IT Manager was awaiting the status of the Water Department camera site from the third party vendor, Unified Technology Partners ("UTP"). The Custodian certified that on December 11, 2020, she learned from the IT Manager that UTP wrote over the Water Department camera site recording for the times requested by the Complainant. The Custodian certified that on December 15, 2020, she informed the Complainant of the updated cost for the Borough Hall camera site and informed him that the Custodian's Counsel would speak to him regarding the Water Department camera site.

The Custodian certified that on December 21, 2020, the Complainant asked to view the requested records; however, the Borough officials denied the Complainant's request to view the records over security concerns, as well as the potential for transmission of the COVID-19 virus. The Custodian certified that later that same date she informed the Complainant of the Borough's decision to deny him an opportunity to review the videos but assured him the videos are clear and distinguishable. The Custodian also certified that she renewed her request for payment from the Complainant of the \$575.00. The Custodian certified that on the same date, the Complainant replied that he would let her know if he wanted to proceed. The Custodian certified that she again placed the OPRA request on hold.

The Custodian certified that on January 21, 2021, the Complainant informed the Custodian that he had not heard from the Custodian's Counsel. The Custodian certified that Counsel was awaiting the Complainant. The Custodian further certified that Counsel "reiterated that the Water Department camera [video] was no longer available." The Custodian certified that the Water Department camera site video was overwritten on November 30, 2020, per Guide requirements.

The Custodian certified that on January 22, 2021, the Complainant paid the costs associated with his OPRA request, and she then took steps to prepare the requested records for disclosure. The Custodian certified that she notified the Complainant on February 4, 2021, that the video was ready for pick up, and he retrieved the hard drive containing the video on February 5, 2021.

Additional Submission:

On March 10, 2021, the Complainant e-mailed the GRC in response to the SOI. The Complainant stated that he notified the Custodian twice prior to November 30, 2020, that he wanted video recordings from both the Sayreville Borough Hall camera site and the Sayreville Water Department camera site. The Complainant stated that he notified the Custodian first in writing via the OPRA request, and subsequently via a verbal request.

Analysis

Timeliness

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).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 October 31, 2007).

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.

Here, the Custodian certified that she received the Complainant's OPRA request on November 18, 2020. The Custodian further certified that following receipt of the OPRA request verbal conversations ensued between the Complainant, the Custodian, and other Borough officials. Moreover, there is nothing in the evidence of record to indicate that the Custodian ever responded to the Complainant's OPRA request in writing.

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.

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.

By submission of an OPRA request dated November 5, 2020, which the Custodian certified was received by her on November 18, 2020, the Complainant sought camera recordings from two Board of Elections drop box locations: (1) the Sayreville Borough Hall; and (2) the Sayreville Water Department. The Custodian did not assert any reason for denying access to the requested records. The only issue, therefore, was the cost to prepare the records for disclosure. Following discussions between the Complainant, the Custodian and other Borough officials, wherein the Complainant stated that the Custodian's Counsel informed him it would cost between \$1,000.00 and \$6,000.00 to have the videos copied, the Complainant e-mailed the Custodian on November 30, 2020, to put the request on hold. The Complainant stated that he then contacted the GRC and learned that the Custodian could only charge him for time and material. Thereafter, by e-mail dated December 15, 2020, the Custodian informed the Complainant that the estimated cost to provide the video recordings for the Borough Hall camera site would be \$575.00. Subsequently, the Complainant paid the \$575.00 and the Custodian certified that the Borough Hall camera site videos were disclosed to him on February 5, 2021. In that same e-mail, the Custodian informed the Complainant that the Custodian's Counsel would call him regarding the Water Department camera site.

On January 21, 2021, the Complainant sent an e-mail to the Custodian to inform her that he never heard from Counsel regarding the Water Department camera site. Shortly thereafter, Counsel e-mailed the Complainant to inform him that the vendor responsible for the camera at the Water Department camera site recorded over the requested Water Department camera site videos.⁵

⁵ Although the Custodian certified in the SOI that Counsel on January 21, 2021 "reiterated" the Water Department camera video was no longer available, there is nothing in the evidence of record to indicate that the Complainant was ever notified previously that the record had been destroyed.

The Custodian certified that the Water Department camera site video was overwritten per Guide requirements. However, there is no such requirement. Based upon the evidence of record, the Guide states that the videos “must be retained, at a minimum, until the period to challenge the election results has passed.” (Emphasis added.)

In Madlinger v. Berkeley Twp. Police Dep’t (Ocean), 2020-90 (Interim Order March 29, 2022), the complainant submitted his OPRA request to the police department for recordings of audio calls. The Council determined that the police communications supervisor knew that records responsive to the request may have existed at the time of her response to the request; however, she informed the complainant that there were no responsive records. Moreover, during the pendency of the complaint, while the supervisor had a duty to safeguard the records from destruction, the recordings were erased. The Council found that the supervisor may have knowingly and willfully violated OPRA and referred the complaint to the Office of Administrative Law (“OAL”) for a hearing to determine whether a civil penalty pursuant to N.J.S.A. 47:1A-11 should be imposed.

Here, the Custodian certified that she received the Complainant’s request on November 18, 2020, and that the 2020 general election was certified by the Middlesex County Clerk on November 20, 2020. Therefore, regardless of the Guide’s challenge period, which the Custodian certified was 10 days following certification, the Custodian knew that an OPRA request was filed seeking the videos from two drop box locations. Moreover, the Complainant stated that in his discussions with the Custodian’s Counsel, he specifically requested the tapes not be erased, and was assured that would not happen. As such, the Custodian had a duty to safeguard the records from destruction; however, she failed to do so and UTP recorded over the Water Department camera site video for the times requested by the Complainant, effectively destroying the requested record.

Accordingly, the Custodian’s failure to safeguard the requested Water Department camera site video from destruction on November 30, 2020, following the Complainant’s November 18, 2020 OPRA request for the record, resulted in spoliation of responsive records. As such, this complaint should be referred to the OAL for a hearing to determine whether the Custodian, or any other Borough official, knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. See Madlinger, GRC 2020-90.

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 October 31, 2007).

2. The Custodian's failure to safeguard the requested Water Department camera site video from destruction on November 30, 2020, following the Complainant's November 18, 2020 OPRA request for the record, resulted in spoliation of responsive records. As such, this complaint should be referred to the Office of Administrative Law for a hearing to determine whether the Custodian, or any other Borough official, knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. See Madlinger v. Berkeley Twp. Police Dep't (Ocean), 2020-90 (Interim Order March 29, 2022).

Prepared By: John E. Stewart

May 23, 2023