



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 25, 2023 Government Records Council Meeting

Joanne Schreyer
Complainant

Complaint No. 2022-199

v.

Township of Belleville (Essex)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 them 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 has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to these request items exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian unlawfully denied access to the Certificates of Occupancy responsive to item No. 2 of both the Complainant’s OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose all responsive Certificates of Occupancy for the two (2) identified properties.
4. **The Custodian shall comply with conclusion No. 3 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
5. The Custodian’s failure to timely respond to the Complainant’s OPRA requests resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Further, the Custodian unlawfully denied access to responsive Certificates of Occupancy. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3 because no records exist. Additionally, while the evidence of record provides that the Custodian committed several missteps throughout the response process, it does not indicate that her violations 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 25th Day of July 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: July 27, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2023 Council Meeting**

**Joanne Schreyer¹
Complainant**

GRC Complaint No. 2022-199

v.

**Township of Belleville (Essex)²
Custodial Agency**

Records Relevant to Complaint:³

OPRA request No. 1: Electronic copies via e-mail of the “[d]ays and hours of operation for Frankie’s Car Wash located at 727 Belleville Avenue in the Township of Belleville (“Township”) and whether the business is “allowed to operate on holidays and weekends.”

OPRA request No. 2: Electronic copies via e-mail of:

1. Days and hours of operation for Belleville Business District/Center located at 3 Montgomery Street in the Township and whether the business is “allowed to operate 24 hours a day, 7 days a week.”
2. Certificate of Occupancy (“CO”) for all businesses at the above address.

OPRA request No. 3: Electronic copies via e-mail of:

1. Days and hours of operation for all businesses located at 15 Willet Street in the Township, including Lombardy Doors, A&V Granite, Hanseatic Moving, *etc.*, and whether the business is “allowed to operate 24 hours a day, 7 days a week.”
2. CO for all businesses at the above address.

Custodian of Record: Kelly A. Cavanagh
Request Received by Custodian: March 23, 2022
Response Made by Custodian: April 4, 2022
GRC Complaint Received: May 16, 2022

¹ No legal representation listed on record.

² Represented by Steven J. Martino, Esq. of the Township of Belleville (Belleville, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

Background⁴

Request and Response:

On March 22, 2022, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On the same day, the Complainant purportedly submitted a third (3rd) OPRA request on behalf of her mother to the Custodian seeking the above-mentioned records.⁵ On April 4, 2022, the eighth (8th) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension of time through April 14, 2022 is necessary to fulfill all three (3) OPRA requests. On April 6, 2022, the Complainant responded stating that while she may understand an extension for OPRA request item No. 1, she does not understand the need for additional time to respond to OPRA request Nos. 2 and 3. The Complainant noted that several years ago, she requested and obtained in a timely manner COs for both identified addresses and wished to obtain the reason an extension is now necessary.

On April 18, 2022, the Complainant e-mailed the Custodian seeking a status update on her pending OPRA requests and noted that the extension of time expired. On April 21, 2022, the Custodian responded in writing disclosing multiple records responsive to OPRA request No. 1 and noting that a second extension through May 4, 2022 was necessary to address OPRA request Nos. 2 and 3. On the same day, the Complainant again questioned the need for an extension of time to locate and disclose COs and hours of operations for two (2) properties. The Complainant also noted that no hours of operations sought in OPRA request No. 1 were included in the response.

On May 5, 2022, the Complainant e-mailed the Custodian stating that again the Township’s self-imposed extended deadline expired without a response. The Complainant sought a status update regarding the outstanding portions of her requests. On the same day, the Custodian responded apologizing for the delay and stating that after conversing with the Code Office, no records containing hours of operation for OPRA request Nos. 2 and 3 exist because those properties are zoned as “industrial.” The Custodian noted that she was still attempting to obtain COs and hoped to have them by the next day. The Complainant responded shortly thereafter stating that the Custodian still had not provided hours of operation as requested in OPRA request No. 1. Further, the Complainant questioned how no records would exist for the other two (2) requests and that she could have to call the Code Office directly to confirm.

On May 10, 2022, the Complainant e-mailed the Custodian reminding her of several items outstanding items spanning her three (3) OPRA requests. The Complainant also again disputed the non-existence of records containing hours for OPRA request Nos. 2 and 3. The Complainant stated that if those businesses were allowed to operate “7 days a week, 24 hours a day,” then the Custodian should confirm such.

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.

⁵ The GRC notes that the OPRA request contained the Complainant’s telephone number and e-mail address, but her mother’s name. While the nature of OPRA request No. 1 may raise a question of standing in this complaint per N.J.S.A. 47:1A-6, the evidence of record including e-mail correspondence between the parties appear to support that the Complainant was responsible for submitting all three (3) OPRA requests.

Denial of Access Complaint:

On May 16, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that herself and her mother have been experiencing multiple noise issues from three (3) commercial properties located near their home. The Complainant noted that after attempting to cure the issues with the Township, she submitted OPRA requests for information “in the event that [she] decide[s] to file a court complaint against” the property managers and owners.

The Complainant first contended that the Custodian failed to timely respond to all three (3) of the OPRA requests, then extended the time frame multiple times without providing the records sought. The Complainant contended that she felt that she had a right to know the names of business owners, types of businesses, and hours within which these businesses were permitted to operate. The Complainant argued that the Township did not disclose hours of operation information and further argued that upon denying access, the Custodian “did not even tell [her] in her e-mail what the hours of operation are.” The Complainant further contended that the Township possessed the records sought and that she gave the Custodian sufficient time to disclose same. The Complainant further contended that she believed the Township was intentionally denying access to the records.

Statement of Information:⁶

On October 4, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on March 23, 2022. The Custodian certified that her search included having the Code Office perform a search of their files by address. The Custodian certified that she responded in writing on April 4, 2022 extending the response time frame through April 14, 2022. The Custodian averred that she subsequently responded again on April 21, 2022 disclosing multiple records and seeking another extension of time until May 4, 2022. The Custodian certified that she finally responded on May 5, 2022 stating that no records existed containing hours of operation for OPRA request Nos. 2 and 3, but that she was still trying to obtain COs for both.

The Custodian first certified that no records containing the hours of operations from any of the properties identified in each OPRA request existed. The Custodian further stated that no COs for the other two (2) properties identified in OPRA request Nos. 2 and 3 were provided. The Custodian did not provide a lawful basis for not disclosing the records, nor did she offer any additional arguments regarding the facts of this complaint.

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.

⁶ On May 27, 2022, this complaint was referred to mediation. On September 27, 2022, this complaint was referred back to the GRC for adjudication.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ 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).

Here, the Complainant submitted her OPRA requests to the Custodian on March 22, 2022 and the Custodian responded in writing on April 4, 2022. In the Denial of Access Complaint, the Complainant asserted that the Custodian failed to respond to her OPRA requests in a timely manner. In the SOI, the Custodian certified to that she received all three (3) OPRA requests on March 23, 2022 and did not respond until April 4, 2022, or the eighth (8th) business day after receipt thereof. Thus, the evidence of record supports that a "deemed" denial of access occurred here.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests 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 them pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Finally, the GRC notes that it does not reach the extension issues because all three (3) OPRA requests were considered "deemed" denied at the time that the Custodian sought her first extension.

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.

Records Containing Hours of Operation

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant's OPRA request No. 1 and item No. 1 of the Complainant's OPRA request Nos. 2 and 3 sought "[d]ays and hours of operation" for multiple businesses located at three (3) addresses, as well as an indication of whether those

⁷ 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.

businesses are allowed to operate at certain times during the week.⁸ The Custodian eventually responded advising that the Code Office advised that no records containing such information existed for OPRA request Nos. 2 and 3. In the Denial of Access Complaint, the Complainant contended that the Township had the information sought and was intentionally withholding it. The Complainant also suggested that the Custodian should have provided the hours of operation in her e-mail responses. In the SOI, the Custodian certified that the Township did not possess any records containing the operating hours responsive to all three (3) of the OPRA requests.

Upon review, the GRC is persuaded that no records responsive existed and that no unlawful denial of access occurred. Specifically, the Complainant provided no evidence to prove that the Township requires businesses to submit their hours of operation on any specific record. Thus, it is logical to conclude that the Township generally does not know the business hours of any commercial enterprise within the municipality. Additionally, OPRA does not require the Custodian to reach out to each of those businesses to acquire their hours to fulfill the instant OPRA requests. Instead, OPRA simply requires the Custodian to disclose a record requested if it exists. Based on the foregoing, a conclusion in line with Pusterhofer is appropriate here.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3. Specifically, the Custodian certified in the SOI, and the record reflects, that no records responsive to these request items exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Certificates of Occupancy

Here, the Custodian advised in her final response to the Complainant that she intended to produce the COs responsive to item No. 2 of both OPRA request Nos. 2 and 3 by May 6, 2022. This complaint followed, wherein the Complainant contended that she still had not received the responsive COs. In the SOI, the Custodian noted that she did not disclose any COs; however, she did not identify a specific lawful basis for denying access or any additional reasons why she did not provide them. Ultimately, in the absence of any sufficient reasons for nondisclosure, and considering the SOI acknowledgement from the Custodian that COs likely existed, a clear unlawful denial of access occurred here.

Accordingly, the Custodian unlawfully denied access to the COs responsive to item No. 2 of both the Complainant's OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose all responsive COs for the two (2) identified properties.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly and 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

⁸ The GRC notes that these request items are, on their face, invalid because they sought information and not a specific, identifiable “government record.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005), LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
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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. 1983)); 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’s failure to timely respond to the Complainant’s OPRA requests resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to responsive Certificates of Occupancy. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3 because no records exist. Additionally, while the evidence of record provides that the Custodian committed several missteps throughout the response process, it does not indicate that her violations 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests 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 them 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 has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no records responsive to these request items exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Custodian unlawfully denied access to the Certificates of Occupancy responsive to item No. 2 of both the Complainant's OPRA request Nos. 2 and 3. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose all responsive Certificates of Occupancy for the two (2) identified properties.
4. **The Custodian shall comply with conclusion No. 3 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
5. The Custodian's failure to timely respond to the Complainant's OPRA requests resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to responsive Certificates of Occupancy. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to OPRA request No. 1 and item No. 1 of OPRA request Nos. 2 and 3 because no records exist. Additionally, while the evidence of record provides that the Custodian committed several missteps throughout the response process, it does not indicate that her violations 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: Frank F. Caruso
Executive Director

July 18, 2023