



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

March 26, 2024 Government Records Council Meeting

Maurice Bronson
Complainant

Complaint No. 2022-527

v.

Township of Irvington (Essex)
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 2024 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 his burden of proof that he 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 immediately to the Complainant’s OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order any further action because the Custodian disclosed the responsive records as part of the Statement of Information on November 17, 2022.
2. The Custodian failed to timely respond to the Complainant’s OPRA request for “immediate access” records. N.J.S.A. 47:1A-5(e). However, the Custodian appears to have attempted to respond on September 26, 2022, through Ms. Brown, and subsequently disclosed the records as part of the Statement of Information. 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 an 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 26th Day of March 2024

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: April 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2024 Council Meeting**

**Maurice Bronson¹
Complainant**

GRC Complaint No. 2022-527

v.

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

Records Relevant to Complaint: Electronic copies via e-mail of “any and all” bills the Township of Irvington (“Township”) received from Ruderman & Roth, LLC in 2021.

Custodian of Record: Harold Wiener

Request Received by Custodian: September 16, 2022

Response Made by Custodian: September 26, 2022

GRC Complaint Received: September 27, 2022

Background³

Request and Response:

On September 15, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that the records he sought were subject to “immediate access” under N.J.S.A. 47:1A-5(e).

On September 26, 2022, allegedly the sixth (6th) business day after receipt of the OPRA request, sub-custodian Shekenna Brown responded in writing on behalf of the Custodian disclosing 95 pages of responsive bills with redactions under the attorney client privilege and work product exemptions and an eight (8) page document index. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On September 27, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that contrary to definitive language in his OPRA request advising that he was seeking “immediate access” records, the Custodian failed to respond immediately thereto. N.J.S.A. 47:1A-5(e); Herron v. Twp. of

¹ No legal representation listed on record.

² Represented by Samantha Mendenhall, Esq. (Irvington, 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.

Montclair, GRC Complaint No. 2006-178 (February 2007). The Complainant contended that as of September 21, 2022, the date he verified this complaint, he had not received a response either disclosing the responsive bills or seeking an extension of time.

Amended Denial of Access Complaint:

On September 29, 2022, the Complainant filed an Amended Denial of Access Complaint. The Complainant argued that he was amending his complaint to add that more than seven (7) business days passed and the Custodian had still not responded to the subject OPRA request. The Complainant argued that the Custodian's failure to respond immediately or at least within seven (7) business days, especially after the filing of this complaint, constitutes a knowing and willful violation. N.J.S.A. 47:1A-11.

Statement of Information:

On November 17, 2022, the Custodian filed a Statement of Information ("SOI").⁴ The Custodian certified that he received the Complainant's OPRA request on September 16, 2022. The Custodian certified that Ms. Brown responded in writing on his behalf on September 26, 2022 disclosing the responsive records with redactions. The Custodian attached 95 pages of responsive records and the eight (8) page document index to the SOI.

The Custodian argued that no unlawful denial of access occurred. N.J.S.A. 47:1A-5(c); N.J.S.A. 47:1A-5(g); Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (June 2009); Karakashian v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office of Medical Examiners, GRC Complaint No. 2013-121, *et seq.* (November 2013). The Custodian argued that there was no bad faith or unlawfulness in the Township's actions.

Additional Submissions:

On November 18, 2022, the Complainant submitted a sur-reply to the SOI. Therein, the Complainant contended that he never received Ms. Brown's response and that the Custodian was "straight up lying" in the SOI.

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

⁴ The Custodian initially mailed a hardcopy of the SOI to the GRC on November 1, 2022, which the GRC received on November 9, 2022. The GRC e-mailed the Custodian on November 10, 2022 confirming receipt and asking if the Complainant also received a copy; the Complainant responded advising that he did not. The GRC thus required the Custodian to send the SOI to the Complainant, noting that his failure to do so could result in the complaint being adjudicated based solely on the Denial of Access Complaint. N.J.A.C. 5:105-2.4(h). The Township sent the SOI to the Complainant on November 17, 2022, which the GRC now considers the official filing date.

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 October 31, 2007).

Likewise, barring extenuating circumstances, a custodian’s failure to respond immediately in writing to a complainant’s OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁶ See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep’t of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron, GRC 2006-178 (holding that the custodian was obligated to notify the complainant immediately as to the status of “immediate access” records).

In the instant complaint, the Complainant submitted his OPRA request seeking “immediate access” bills on September 15, 2022. The Complainant subsequently verified his Denial of Access Complaint on September 21, 2022 arguing that the Custodian failed to respond in the statutory time frame. The GRC received this complaint on September 27, 2022 and the Complainant subsequently amended his complaint on September 29, 2022 asserting that the Custodian failed to respond within the seven (7) business day time frame. In the SOI, the Custodian certified that he received the OPRA request on September 16, 2022 and Ms. Brown responded disclosing 95 pages of records and a document index on September 26, 2022. The Custodian included as evidence of this response a screenshot from what appears to be the Township’s OPRA request system. The Complainant responded to the SOI contending that he never received the response in question and that the SOI was false.

As a threshold issue, the evidence of record raises a significant question regarding Ms. Brown’s alleged response. The Complainant asserted on both September 29, 2022 and November 18, 2022 that he did not receive Ms. Brown’s response. In the SOI, the Custodian included a printout from the Township’s OPRA system that identifies the OPRA request as “Complete” with a response date of September 26, 2022. However, the last line of the print-out states “Rejected”. The absence of separate correspondence showing a direct response to the Complainant, the term “Rejected” in the OPRA system printout, the potential electronic file size of the disclosed records, and the Complainant’s assertions strongly insinuate that disclosure was not achieved.

Notwithstanding the forgoing, the evidence of record supports that a timeliness violation occurred because the Custodian failed to respond to the OPRA request immediately, as provided

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.

⁶ OPRA lists immediate access records as “budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5(e). The Council has also determined that invoices are “immediate access” records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

for in both N.J.S.A. 47:1A-5(e) and Herron, GRC 2006-178. Specifically, even if Ms. Brown's response was successfully delivered, six (6) business days cannot be considered "immediate" as intended in OPRA. Further, because the timeliness violation occurred prior to the expiration of the seventh (7th) business day, the GRC will not address whether a violation of the normal statutory response time frame also occurred.

Therefore, the Custodian did not bear his burden of proof that he 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 immediately to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178. However, the GRC declines to order any further action because the Custodian disclosed the responsive records as part of the SOI on November 17, 2022.

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 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)).

In the matter before the Council, the Custodian failed to timely respond to the Complainant's OPRA request for "immediate access" records. N.J.S.A. 47:1A-5(e). However, the Custodian appears to have attempted to respond on September 26, 2022, through Ms. Brown, and subsequently disclosed the records as part of the SOI. 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 an 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 his burden of proof that he 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 immediately to the Complainant's OPRA requests either granting access, denying access, seeking clarification or requesting an extension of time resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). However, the GRC declines to order any further action because the Custodian disclosed the responsive records as part of the Statement of Information on November 17, 2022.

2. The Custodian failed to timely respond to the Complainant's OPRA request for "immediate access" records. N.J.S.A. 47:1A-5(e). However, the Custodian appears to have attempted to respond on September 26, 2022, through Ms. Brown, and subsequently disclosed the records as part of the Statement of Information. 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 an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

March 19, 2024