



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

April 30, 2024 Government Records Council Meeting

Linda Kent
Complainant

Complaint No. 2022-629 and 2022-630

v.

City of Estell Manor
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 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 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). Notwithstanding, the GRC declines to order any further action because the City, through Mr. Moore and its attorney, disclosed all responsive records via e-mail on December 29, 2022 and April 12, 2023 respectively.
2. The Custodian’s failure to respond to the subject 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, Mr. Moore provided conflicting statements to the GRC regarding the handling of the subject OPRA requests that caused further confusion in adjudicating this complaint. However, the City, through Mr. Moore and its attorney, ultimately disclosed all responsive records to the Complainant on December 29, 2022 and April 12, 2023 respectively. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA or Mr. Moore’s conflicting statements 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. However, the Custodian’s “deemed” denial of access and Mr. Moore’s subsequent conflicting statements appear negligent and heedless since both were, at some point between submission of the OPRA requests and this decision, vested with the legal responsibility of granting and denying access in accordance with the law.

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 30th Day of April 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: May 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2024 Council Meeting**

**Linda Kent¹
Complainant**

GRC Complaint No. 2022-629 and 2022-630²

v.

**City of Estell Manor (Atlantic)³
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. Each payroll report for the Complainant from 2018 through 2022, showing all deductions.⁴
2. All audit reports from 2017 through 2021.⁵

Custodian of Record: Lekisha Roberson⁶

Request Received by Custodian: September 23, 2022

Response Made by Custodian: January 3, 2023; January 20, 2023

GRC Complaint Received: November 3, 2022

Background⁷

Request and Response:

On September 23, 2022, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On November 3, 2022, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant asserted the Custodian failed to respond to either of her OPRA requests.

¹ No legal representation listed on record.

² These complaints have been consolidated due to commonalty of parties and issues.

³ No legal representation listed on record.

⁴ This OPRA request is the subject of GRC 2022-629.

⁵ This OPRA request is the subject of GRC 2022-630.

⁶ The current Custodian of Record is Lisa Marcolongo.

⁷ 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.

Statement of Information:

On December 20, 2022, the GRC sent the Custodian a request to file the Statement of Information (“SOI”) for both complaints. On January 26, 2023, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC noted that the Custodian’s failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f).

On February 16, 2023, the GRC forwarded the “No Defense” letter to former Acting Municipal Clerk Judson Moore, seeking confirmation as to whether the SOI requests were received. On February 18, 2023, Mr. Moore advised that the City of Estell Manor’s (“City”) did not presently have a municipal clerk; thus, he would be addressing the present complaints and subject OPRA requests. Mr. Moore stated that he was “[w]orking on completing the OPRA request” but could not find an SOI form on the GRC’s website. Mr. Moore noted that he could obtain payroll information for 2019 and 2020 from the City’s payroll software and that the auditor will provide the audits. Mr. Moore noted that payroll records from 2018 and prior are not contained in the payroll system and will need to be collected from storage in the basement. Mr. Moore asserted that he would have to charge \$40.00 an hour for two (2) hours to retrieve said records and should have them to send to the City’s attorney by close of business.

On February 22, 2023, the GRC responded providing Mr. Moore with a copy of the SOI form. The GRC stated that the City was required to adhere to all regulatory requirements in filing the SOI and a formal letter of representation if represented by an attorney. Further, the GRC stated that because of the significant passage of time since the filing of these complaints, the SOI submissions are due on February 27, 2023 with no exceptions.

On February 27, 2023, Mr. Moore filed a SOI for both complaints. Mr. Moore certified that the City received the Complainant’s OPRA requests on September 23, 2022. Mr. Moore certified that his search included examining stored hard copies of potentially responsive records. Mr. Moore certified that he responded to OPRA request No. 2 on January 3, 2023 and OPRA request No. 1 on January 20, 2023.

Mr. Moore first noted that the City was still without a clerk, either regular or acting. Mr. Moore argued that regarding OPRA request No. 1, he offered to provide the Complainant her W-2 forms from 2019 and 2020 in lieu of searching for and copying four (4) years of payroll records. Mr. Moore stated that the Complainant refused this option and, recognizing that she was entitled to the requested payroll information, has gathered the responsive records “and will provide them to the Complainant.” Mr. Moore further argued that regarding OPRA request No. 2, audits were disclosed to the Complainant on January 3, 2023.

Additional Submissions:

On March 28, 2024, the GRC sent a request for additional information to Mr. Moore. The GRC stated that there existed conflicting statements between Mr. Moore’s February 18, 2023 e-mail and subsequent SOI filing on if and when he disclosed, or intended to disclose, responsive records. The GRC thus sought a certified response to the following:

1. Regarding OPRA request No. 1, have you obtained and disclosed to the Complainant each of the requested payroll reports specific to her from 2018 to 2022. If yes, identify the exact date(s) of disclosure and provide supporting documentation that same occurred.
 - a. Also, please provide evidence of your correspondence with the Complainant between January 20, 2023 and January 24, 2023 regarding the W-2 conversation.
2. Regarding OPRA request No. 2, did you or another City official disclose the responsive audits to the Complainant on or after January 3, 2023, as certified in the SOI? If yes, please provide supporting documentation that same occurred.

The GRC requested that Mr. Moore's response be submitted no later than April 3, 2024.

On April 2, 2024, the current Custodian submitted a response to the GRC's request for additional information. In response to question No. 1, the current Custodian certified that on April 12, 2023, the City's attorney e-mailed to the Complainant payroll sheets from January 1, 2018 through August 14, 2020. The current Custodian attached the supporting e-mail showing this disclosure. In response to question No. 2, the current Custodian certified that on December 29, 2022, Mr. Moore e-mailed to the Complainant the responsive audits in five (5) e-mails due to the file size of each. The current Custodian attached the supporting e-mails showing this disclosure.

On April 11, 2024, the GRC e-mailed the Custodian seeking the final date that the Complainant received pay from the City. On April 16, 2024, Mr. Moore responded stating that the Complainant's last day of employment was August 11, 2020.

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).⁸ 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 argued that the City failed to respond to either of the subject OPRA requests. In the SOI, Mr. Moore certified that the City received the subject OPRA requests on September 23, 2022. Further, Mr. Moore certified to allegedly responding in January 2023; however, the current Custodian's response to a request for additional information actually supports that the City responded to OPRA request No. 2 on December 29, 2022 and OPRA request No. 1

⁸ 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.

on April 12, 2023 disclosing all responsive records. Notwithstanding the response date discrepancies, the evidence of record clearly supports that a “deemed” denial of access occurred.

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. Notwithstanding, the GRC declines to order any further action because the City, through Mr. Moore and its attorney, disclosed all responsive records via e-mail on December 29, 2022 and April 12, 2023 respectively.

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)).

Here, the Complainant’s OPRA requests went unanswered for several months. The GRC notes that Mr. Moore subsequently stated in correspondence prior to the SOI, and later therein, that the City was without a municipal clerk at that time. A review of the City’s 2023 meeting minutes posted to its website shows that the Custodian was still with the City as late as February 7, 2023,⁹ over four (4) months after submission of the subject OPRA requests and over a month after the GRC initially sought submission of an SOI for both complaints. It was shortly thereafter that Mr. Moore performed the duties of the municipal clerk and communicated with the GRC regarding these complaints. It appears the City finally appointed the current Custodian through

⁹ <https://ecode360.com/ES0890/document/753016470.pdf> (accessed April 16, 2024).

Resolution 37-2023 at the February 21, 2023 special meeting.¹⁰ Notwithstanding, the City has not provided a clear explanation on why the Complainant's OPRA requests went unanswered for three (3) to five (5) months.

Ultimately, and notwithstanding all the confusion caused by the City's lack of response and Mr. Moore's conflicting statements in correspondence to the GRC, the evidence of record supports that disclosure occurred. The GRC notes that while the record lacks a detailed explanation of the City's inability to respond to the OPRA request, it understands that the City is a particularly minuscule agency within a small municipality of less than 2,000 residents.¹¹ However, the GRC would be remiss if it did not point out that it appears the City did not have in place an efficient OPRA process that would have avoided the issues identified in these complaints. At the very least, the evidence strongly suggests that the City did not designate a substitute custodian to address OPRA requests in the absence of the designated custodian.

The GRC is thus persuaded that the evidence of record does not indicate that the City ignored the OPRA requests with intent to violate OPRA. Instead, the actions of the City, the Custodian, and Mr. Moore were negligent and heedless. Specifically, it appears that these OPRA requests were lost to a haphazard process and fluctuations in staffing within the City. Notwithstanding, such a finding compels the GRC to stress that public agencies are required to respond to OPRA requests in the manner prescribed by the statute; such compliance is mandatory and not elective. The City should consider revisiting its procedures and making changes where necessary to ensure that its OPRA process is up to the standards required by the statute.

Accordingly, the Custodian's failure to respond to the subject 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, Mr. Moore provided conflicting statements to the GRC regarding the handling of the subject OPRA requests that caused further confusion in adjudicating this complaint. However, the City, through Mr. Moore and its attorney, ultimately disclosed all responsive records to the Complainant on December 29, 2022 and April 12, 2023 respectively. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA or Mr. Moore's conflicting statements 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. However, the Custodian's "deemed" denial of access and Mr. Moore's subsequent conflicting statements appear negligent and heedless since both were, at some point between submission of the OPRA requests and this decision, vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

¹⁰ <https://ecode360.com/ES0890/document/724542048.pdf> (accessed April 16, 2024).

¹¹ According to the U.S. Census Bureau, the City's total population in 2020 was 1,668. Thus, the City would qualify for limited OPRA hours under N.J.S.A. 47:1A-5(a). However, there is no evidence in the record to suggest that the City has availed itself of limited OPRA hours or if they have, that the general public has been made aware of such.

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). Notwithstanding, the GRC declines to order any further action because the City, through Mr. Moore and its attorney, disclosed all responsive records via e-mail on December 29, 2022 and April 12, 2023 respectively.

2. The Custodian's failure to respond to the subject 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, Mr. Moore provided conflicting statements to the GRC regarding the handling of the subject OPRA requests that caused further confusion in adjudicating this complaint. However, the City, through Mr. Moore and its attorney, ultimately disclosed all responsive records to the Complainant on December 29, 2022 and April 12, 2023 respectively. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA or Mr. Moore's conflicting statements 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. However, the Custodian's "deemed" denial of access and Mr. Moore's subsequent conflicting statements appear negligent and heedless since both were, at some point between submission of the OPRA requests and this decision, vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso
Executive Director

April 23, 2024