



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ACTING COMMISSIONER LUCILLE DAVY
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DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

February 28, 2007 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2006-178

v.

Township of Montclair
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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 violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.
2. The Custodian should have obtained a written agreement from the Complainant extending the time period to respond to the request pursuant to John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).
3. While the Custodian certifies that the requested contract does not exist, the immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant of such.

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 28th Day of February, 2007

Vincent P. Maltese, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: March 7, 2007

**Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

David Herron¹

GRC Complaint No. 2006-178

Complainant

v.

Township of Montclair²
Custodian of Records

Records Relevant to Complaint: Employment contract for Diane Marus, Chief Financial Officer³

Request Made: August 22, 2006

Response Made: September 13, 2006

Custodian: Linda Wanat

GRC Complaint Filed: October 9, 2006

Background

August 22, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

September 13, 2006

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the fifteenth (15th) business day following receipt of such request. The Custodian states that the requested record is being denied because no employment contract for Diane Marus exists.

October 9, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's OPRA request dated August 22, 2006 attached. The Complainant states that he submitted his OPRA request on August 22, 2006 for the employment contract of Diane Marus, Chief Financial Officer. The Complainant states

¹ No legal representation listed on record.

² Represented by Alan Trembulak, Esq. (Montclair, NJ).

³ Additional records were requested, however they are not the subject of this complaint.

that on September 13, 2005, the Custodian denied him access to the requested contract by indicating that no contract exists.

October 19, 2006

Offer of Mediation sent to both parties. Neither party agreed to mediate this complaint.

October 30, 2006

Request for Statement of Information sent to the Custodian.

November 3, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 22, 2006
- Letter of appointment from Joseph Hartnett, Township Manager to Diane Marus dated April 13, 2005
- E-mail from Joseph Hartnett, Township Manager to Carla Horowitz dated April 18, 2005
- Memorandum from Katherine Dougher Berning, Director of Human Resources to Linda Wanat, Municipal Township Clerk dated November 3, 2006

The Custodian certifies receiving the Complainant's OPRA request on August 22, 2006. She certifies that on August 30, 2006, six (6) business days following the date of the request, she spoke with the Complainant regarding an extension of time to provide the requested records. Additionally, the Custodian certifies that on September 13, 2006, she notified the Complainant in writing that the municipality does not offer contracts to non-union management employees such as Diane Marus. However, the Custodian certifies that she provided the Complainant with Diane Marus' letter of appointment dated April 13, 2005, as well as an e-mail from Joseph Hartnett to Carla Horowitz dated April 18, 2005. The Custodian requests that the GRC make a determination that this complaint is without merit.

November 27, 2006

The Complainant's response to the Custodian's SOI. The Complainant asserts that there is incorrect information on some of the documents submitted to the GRC by the Custodian. Specifically, on the Custodian's submission of the Complainant's OPRA request dated August 22, 2006, the Complainant asserts that two handwritten notations do not appear on his copy of the request, which he received back from the Custodian. These handwritten notations read as follows:

- August 30, 2006 – spoke to Mr. Herron regarding an extension of time to gather all materials.

- September 13, 2006 – provided contracts for Joseph Hartnett and Alan Trembulak; the municipality does not offer contracts to non-union management employees or union employees

The Complainant contends that his copy of his August 22, 2006 OPRA request included a handwritten notation from the Custodian indicating that there are no employment contracts for Diane Marus. The Complainant claims that the Custodian is attempting to mislead the GRC. Additionally, the Complainant asserts that the Custodian's statement that on September 13, 2006, the Complainant viewed a letter to Diane Marus dated April 13, 2005 and an e-mail to Carla Horowitz dated April 18, 2005, is inaccurate. The Complainant contends that he never viewed said documents, nor was he advised that said documents existed.

January 3, 2007

Letter from GRC to Custodian. GRC requests that the Custodian provide a legal certification in response to the following questions:

1. Explain why the Complainant's OPRA request form, dated August 22, 2006, which was submitted with the Township's Statement of Information differs from the copy submitted by the Complainant with his Denial of Access Complaint. (Explain why the Complainant contends that the copy he received back from the Custodian does not include certain handwritten entries which appear on the copy submitted to the GRC with the Custodian's Statement of Information.)
2. Did the Complainant view the following documents on Sept 13, 2006?
 - Letter of appointment from Joseph Hartnett, Township Manager to Diane Marus dated April 13, 2005
 - E-mail from Joseph Hartnett, Township Manager to Carla Horowitz dated April 18, 2005

January 5, 2007

Custodian's certification in response to GRC's letter dated January 3, 2007. The Custodian certifies that the Complainant's OPRA request form submitted with the Township's Statement of Information differs from the form submitted with the Complainant's Denial of Access Complaint because it includes typed and handwritten notations prepared by Township employees regarding the processing of the Complainant's request. The Custodian certifies that it is standard practice in her office to record important information on the file copy of the OPRA request form. As such, the Custodian certifies that the Township's copy of the Complainant's request form includes typed notations dated August 30, 2006 and September 13, 2006 documenting events which took place on those dates.

Additionally, the Custodian certifies that the Township's copy of the Complainant's OPRA request includes a handwritten notation from Juliet Lee, Municipal Records, Licensing and Data Coordinator, which states that the Complainant came in to review contracts and was satisfied. The Custodian certifies that she confirmed with the Licensing and Data Coordinator that on September 13, 2006, the Complainant was provided with a copy of the letter of appointment from Joseph Hartnett, Township

Manager to Diane Marus dated April 13, 2005. The Custodian further certifies that as the Complainant did not want to purchase a copy of said letter, he scanned said letter into a portable scanner. In addition, the Custodian certifies that on September 13, 2006, the Complainant was also provided a copy of the e-mail from Joseph Hartnett, Township Manager to Carla Horowitz dated April 18, 2005. The Custodian certifies that as the Complainant did not want to purchase a copy of said e-mail, he scanned said e-mail into a portable scanner.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

“*[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.*” (Emphasis added.) N.J.S.A. 47:1A-5.e.

Further, OPRA provides that:

“...[i]f the custodian is *unable to comply with a request* for access, the custodian shall *indicate the specific basis therefore* on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” (Emphasis added.) N.J.S.A. 47:1A-5.g

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

The Complainant states that he submitted his OPRA request on August 22, 2006. He states that on September 13, 2005, the fifteenth (15th) business day following the date of the request, the Custodian denied him access to the requested contract by indicating that no contract exists. Additionally, the Complainant asserts that there is incorrect information on some of the documents submitted to the GRC by the Custodian. Specifically, on the Custodian’s submission of the Complainant’s OPRA request dated August 22, 2006, the Complainant asserts that two handwritten notations do not appear on his copy of the request, which he received back from the Custodian. These handwritten notations read as follows:

- August 30, 2006 – spoke to Mr. Herron regarding an extension of time to gather all materials.
- September 13, 2006 – provided contracts for Joseph Hartnett and Alan Trembulak; the municipality does not offer contracts to non-union management employees or union employees

The Complainant contends that his copy of his August 22, 2006 OPRA request included a handwritten notation from the Custodian indicating that there are no employment contracts for Diane Marus. The Complainant claims that the Custodian is attempting to mislead the GRC. Additionally, the Complainant asserts that the Custodian’s statement that on September 13, 2006, the Complainant viewed a letter to Diane Marus dated April 13, 2005 and an e-mail to Carla Horowitz dated April 18, 2005, is inaccurate. The Complainant contends that he never viewed said documents, nor was he advised that said documents existed.

The Custodian certifies receiving the Complainant’s OPRA request on August 22, 2006. She certifies that on August 30, 2006, six (6) business days following the date of the request, she spoke with the Complainant regarding an extension of time to provide the requested records. Additionally, the Custodian certifies that on September 13, 2006, she notified the Complainant in writing that the municipality does not offer contracts to non-union management employees such as Diane Marus. However, the Custodian certifies

that she provided the Complainant with Diane Marus' letter of appointment dated April 13, 2005, as well as an e-mail from Joseph Hartnett to Carla Horowitz dated April 18, 2005. The Custodian requests that the GRC make a determination that this complaint is without merit.

Additionally, the Custodian certifies that the Complainant's OPRA request form submitted with the Township's Statement of Information differs from the form submitted with the Complainant's Denial of Access Complaint because it includes typed and handwritten notations prepared by Township employees regarding the processing of the Complainant's request. The Custodian certifies that it is standard practice in her office to record important information on the file copy of the OPRA request form. As such, the Custodian certifies that the Township's copy of the Complainant's request form includes typed notations dated August 30, 2006 and September 13, 2006 documenting events which took place on those dates.

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. 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.

OPRA also provides that if a Custodian is unable to comply with a records request, he must notify the Complainant in writing indicating a lawful reason for same pursuant to N.J.S.A. 47:1A-5.g. Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days of receipt of said request. As also prescribed under 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.

In John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the GRC held that:

...the Custodian knew that he needed additional time in order to adequately respond to the Complainant's request as he was seeking legal advice from the Prosecutor, however he failed to notify the Complainant in writing of same. Although it is reasonable that a custodian would seek legal advice prior to responding to a request for records, the Custodian is still obligated to adhere to the provisions of OPRA. The Custodian could have tried to obtain a written agreement from the Complainant in order to extend the time period required to respond; however he failed to do so. This failure resulted in the Custodian's delay in a written response to the Complainant beyond the time period prescribed under OPRA.

The facts of this complaint are similar to those in Paff in that the Custodian required additional time to respond to the Complainant's OPRA request, but failed to document such in writing. Additionally, the Custodian certifies that the requested contract does not exist. Therefore, the Custodian violated N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g by failing to provide the Complainant with a written response stating

that the requested records does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial. Additionally, the Custodian should have obtained a written agreement from the Complainant extending the time period to respond to the request pursuant to John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).

OPRA also mandates that immediate access ordinarily shall be granted to contracts pursuant to N.J.S.A. 47:1A-5.e. While the Custodian certifies that the requested contract does not exist, the immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant of such.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

4. The Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.
5. The Custodian should have obtained a written agreement from the Complainant extending the time period to respond to the request pursuant to John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).
6. While the Custodian certifies that the requested contract does not exist, the immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant of such.

Prepared By:

Dara Lownie
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 21, 2007