



State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

VINCENT P. MALTESE, Chairman
ACTING COMMISSIONER CHALRES RICHMAN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

September 26, 2007 Government Records Council Meeting

Martin Costello
Complainant

Complaint No. 2007-137

v.

Township of Wyckoff
Custodian of Record

At the September 26, 2007 public meeting, the Government Records Council ("Council") considered the September 19, 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's failure to respond in writing to the Complainant's OPRA request within seven (7) business days resulted in a deemed denial. Therefore, the Custodian has unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has also failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Because the Custodian provided the Complainant with a copy of the landscape plan as soon as she realized that it was also included within the request and provided the Complainant with a copy of the audio tapes once they were reformatted and copied, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is 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 26th Day of September, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 3, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 26, 2007 Council Meeting**

**Martin Costello¹
Complainant**

GRC Complaint No. 2007-137

v.

**Township of Wyckoff²
Custodian of Records**

Records Relevant to Complaint:

1. Copy of the audio tape from the May 17, 2007 meeting of the Zoning Board of Adjustment regarding the first (1st) application of the evening for 66 Van Schaik Lane. The tape is approximately forty-five (45) minutes.
2. The most recent landscape plans dated May 4, 2007 for 66 Van Schaik Lane.

Request Made: May 18, 2007

Response Made: None

Custodian: Joyce Santimauro

GRC Complaint Filed: June 8, 2007

Background

May 18, 2007

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

June 1, 2007

Nine (9) days after the OPRA request was submitted, the Complainant telephones the Custodian to inquire the status of his OPRA request. The Custodian advises the Complainant that she has not received written authorization for the fees associated with reformatting and copying the tape, and that the landscape plan is ready for the Complainant to pick up.

June 1, 2007

Letter from the Complainant to the Custodian. The Complainant states that per the Custodian's request this morning when he called to inquire why he had not received a response to his OPRA request within seven (7) business days, he hereby agrees in writing to pay \$149 per hour plus \$1 for a tape for the discussion of the first (1st) application of the May 17, 2007 meeting of the Zoning Board of Adjustment regarding 66 Van Schaik Lane which lasted approximately forty-five (45) minutes.

¹ No legal representation listed on record.

² Represented by Robert E. Landel, Esq. (Franklin Lakes, NJ).

June 8, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching a letter from the Complainant to the Custodian dated June 1, 2007.

The Complainant asserts that he submitted his OPRA request directly to the Custodian on May 18, 2007 and was informed by the Custodian that the fee for reformatting and copying would be \$149 per hour for the requested tape plus \$1 for the tape. The Complainant also asserts that he informed the Custodian that he was only seeking 45 minutes of the meeting that pertained to 66 Van Schaik Lane, and that the Custodian told the Complainant that she would tell the Complainant if that would be possible. The Complainant further asserts that he waited nine (9) business days before calling the Custodian to inquire about the status of his OPRA request.

The Complainant contends that the Custodian told him that she needed the Complainant to approve in writing the fee of \$149 per hour for reformatting and copying the audio tape and that the Custodian did not realize at the time of receiving the request that the Complainant had also requested a landscape plan. The Complainant contends that he specifically went over the OPRA request form with the Custodian line by line at the time he submitted the request, therefore he does not understand why she was unaware of the totality of the request. The Complainant further contends that the Custodian requested that the Complainant fax his approval of the fees for the audio tape and that the Complainant did this on June 1, 2007.

The Complainant states that he picked up the landscape plan on June 4, 2007, but as of this date he has still not received a response regarding the audio tapes.

June 9, 2007

Complainant receives Custodian’s letter dated June 7, 2007. The Custodian advises the Complainant that the cost for reformatting and copying the May 17, 2007 Board of Adjustment audio cassette tape by an outside vendor is \$148.20. The Custodian also advises the Complainant that the Custodian will need a check in the amount of \$148.20 delivered to her office prior to the vendor copying the tapes. The Custodian further advises the Complainant that once he delivers the check then arrangements will be made with the vendor.

June 12, 2007

Offer of Mediation sent to both parties.

June 14, 2007

Complainant delivers a check in the amount of \$148.20 to Mary Ellen at the Wyckoff Town Hall.

June 18, 2007

The Complainant declines mediation and requests that the GRC proceed with adjudication. The Custodian agreed to mediation.

June 18, 2007

Request for the Statement of Information sent to the Custodian.

June 21, 2007

Complainant meets with the Custodian's Counsel to pick up the audio tape.

June 22, 2007

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request form dated May 18, 2007.

The Custodian asserts that the Complainant submitted his OPRA request on May 18, 2007 and that the Complainant was informed that a written authorization would be needed for the audio tape because it must be outsourced for reformatting and copying. The Custodian also asserts that the Complainant telephoned her office on June 1, 2007 requesting the status of the OPRA request and the Custodian advised the Complainant that she had not received the written authorization from the Complainant. The Custodian further asserts that she made a mistake by so closely focusing on the audio tape request that she did not recall that the OPRA request was for a landscape plan as well. The Custodian adds that she called the Complainant on June 1, 2007 and advised him that he could pick up the landscape plan, which he did.

The Custodian states that her office consists of two and a half (2 ½) staff members and last year the office received three hundred and one (301) OPRA requests and has never before been involved in a complaint. The Custodian also states that one of her employees left during the second (2nd) half of May and that she had to train the replacement employee. The Custodian further states that she was preparing for the Township's liquor license renewals during the time of the OPRA request, which were renewed on June 4, 2007. Further, the Custodian states that she had the first contested primary election in thirteen (13) years on June 5, 2007 and was responding to many of those questions. The Custodian also added that she was the coordinator for the Township's Memorial Day Parade on May 28, 2007.

The Custodian contends that she was responsible for all of these things during one short period of time. The Custodian also contends that she did not deny access to any records and that the Complainant was provided with the audio tapes on June 21, 2007. The Custodian further contends that she admitted to the Complainant that she made a mistake when she overlooked the Complainant's OPRA request for landscape plans.

July 9, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel contends that N.J.S.A. 47:1A-1.1 was adopted to ensure that all citizens have reasonable access to all appropriate government records. The Custodian's Counsel also contends that the statute contains many exclusions to the rule and itemizes records which are not included in the definition of a government record. The Custodian's Counsel further contends that in this case there is no dispute that the information requested by the Complainant is a public record pursuant to OPRA, and therefore the Custodian does not nor did she ever take the position that access to the requested records was denied; in fact, the Complainant has received all of the requested records.

The Custodian's Counsel asserts that N.J.S.A. 47:1A-6 provides the process the requestor must take if denied access to a government record, in which one option is that

the requestor may file a complaint with the GRC. The Custodian's Counsel also asserts that the statute in this particular section has been drafted to deal with instances where access has been intentionally denied by the Custodian and that this is made clear by the possible relief provided to the complaining requestor: "if it is determined that access has been improperly denied, the Court or agency head shall order that access be allowed." N.J.S.A. 47:1A-6. The Custodian's Counsel further asserts that the requested records have been provided to the Complainant and that there was never any intent to deny the Complainant the requested records; the Custodian made an innocent oversight which resulted in the landscape plan being provided three (3) days beyond the statutorily mandated deadline.

The Custodian's Counsel contends that N.J.S.A. 47:1A-11 provides penalties for a Custodian who knowingly and willfully violates OPRA and is found to have unreasonably denied access under the totality of the circumstances. The Custodian's Counsel also contends that in order to find a knowing and willful violation of OPRA, the statute requires an intentional, knowing and willful act that results in an unreasonable denial of access to the records. In addition, the Custodian's Counsel asserts that the statute requires a review of the facts under the totality of the circumstances. The Custodian's Counsel further contends that the statute does not contemplate the valuable time of the GRC being expended on frivolous complaints.

The Custodian's Counsel asserts that the statutory emphasis on providing records in a timely fashion should not be ignored and that the Township of Wyckoff will continue to respond to its voluminous OPRA requests in a timely fashion. The Custodian's Counsel also asserts that the actions and behavior of the Custodian do not constitute a knowing and willful violation of OPRA and unreasonable denial of access contemplated by the statute. The Custodian's Counsel further asserts that the records have been provided to the Complainant; therefore this complaint is frivolous and moot.

July 11, 2007

Letter from the Complainant to the GRC attaching a letter from the Custodian to the Complainant dated June 7, 2007.³

The Complainant states that on June 9, 2007 he received a letter dated June 7, 2007 from the Custodian requesting that the Complainant deliver a check in the amount of \$148.20 for the cost of reformatting and copying the requested audio tapes. The Complainant also states that on June 14, 2007 he delivered the check to Mary Ellen at the Wyckoff Town Hall. The Complainant further states that on June 21, 2007 the Complainant met with the Custodian's Counsel at his request to pick up the audio tape.

The Complainant asserts that the Custodian's Counsel informed the Complainant that he wanted to meet to explain the problems with the audio tape, specifically that the Township's vendor produced an inaudible copy of the requested tape. The Complainant also asserts that the Custodian's Counsel informed him that the Custodian was told by the

³ The Complainant also enclosed additional materials which are not relevant to the adjudication of this complaint. The Complainant also included a copy of his original \$148.20 check and a letter from the Custodian returning the check to the Complainant because the copy produced by the Township's vendor was inaudible.

vendor that all tapes reformatted and copied from Wyckoff's system would be inaudible. The Complainant further asserts that the Custodian's Counsel informed him that he personally took a hand held recorder and made a copy of the tape for the Complainant.

The Complainant contends that the Custodian's Counsel stated that the Custodian is not a spiteful person nor is she political in any way; she is overworked, under paid and very upset by this whole matter. The Complainant also contends that the Custodian's Counsel requested that the Complainant withdraw his complaint because it is costing the taxpayers money. The Complainant further contends that he then stopped the Custodian's Counsel and told the Custodian's Counsel that if he submits an OPRA request to the Custodian, a response should be received in a timely manner without any problems because by law it is the Complainant's right as a resident. The Complainant then requested that the Custodian's Counsel file an official response to the complaint and that if the Complainant agrees with such response then he would consider withdrawing the complaint.

The Complainant asserts that on June 25, 2007 he spoke to Mr. Thomas Graziano from the Township's vendor and Mr. Graziano confirmed that any meeting recorded on Wyckoff's system at ¼ speed would be inaudible when reformatting and copying to another tape. The Complainant also asserts that Mr. Graziano also stated that he is preparing a presentation to Wyckoff's officials for a new digital recording system. The Complainant further asserts that on June 26, 2007, he telephoned the Custodian's Counsel and explained to him that he wanted to ensure that future OPRA requests would be handled properly by the Custodian and that he also wanted assurance that a new recording system is being seriously considered by the Wyckoff's officials. The Complainant then asked the Custodian's Counsel to send him a letter or memo addressing these two (2) issues and then the complaint would be withdrawn.

The Complainant contends that on July 10, 2007 he received the Custodian's Counsel's letter dated July 9, 2007 which referred to this complaint as frivolous and moot. The Complainant also contends that it is because of this arrogance and blatant disregard for the residents of Wyckoff that he seeks the GRC's assistance in taking severe action in order to send a clear message to Wyckoff's officials.

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 ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also 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 therefore ...” N.J.S.A. 47:1A-5.g.

OPRA further 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.

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.

In the complaint before the Council, the evidence of record indicates that the Custodian did not respond in writing to the Complainant’s May 18, 2007 OPRA request.

Pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian should have responded in writing no later than May 30, 2007, granting access, denying access, requesting an extension of time, or requesting clarification of the request. In a prior GRC decision, Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007), the Council found that although the Custodian did ultimately provide the Complainant with all of the records responsive, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response granting access, denying access, seeking clarification or requesting an extension, within the statutorily mandated seven (7) business days.

Similarly, even though the Custodian herein eventually released the requested records to the Complainant, the Custodian's failure to respond in writing to the Complainant's request within seven (7) business days resulted in a deemed denial. Therefore, the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has also failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Whether the delay in access to the requested records rises to the level of a knowing and willful violation of OPRA?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or 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 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.

The Custodian certifies that although she initially overlooked the Complainant's request for landscape plans, she provided the Complainant with the landscape plans on June 4, 2007. The Custodian also certifies that she released a copy of the requested audio tape to the Complainant on June 21, 2007.

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 at 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 (Berg); 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 (App. Div. 1996) at 107).

Because the Custodian provided the Complainant with a copy of the landscape plan as soon as she realized that it was part of the request and provided the Complainant with a copy of the audio tapes once they were reformatted and copied, it is concluded that

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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is 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:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request within seven (7) business days resulted in a deemed denial. Therefore, the Custodian has unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Custodian has also failed to bear her burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Because the Custodian provided the Complainant with a copy of the landscape plan as soon as she realized that it was also included within the request and provided the Complainant with a copy of the audio tapes once they were reformatted and copied, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Tiffany L. Mayers
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

September 19, 2007