



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

December 18, 2008 Government Records Council Meeting

Michael Hogan
Complainant

Complaint No. 2007-267

v.

Township of Washington (Bergen)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council (“Council”) considered the December 10, 2008 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 failed to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Notwithstanding the Custodian’s “deemed denial,” the Custodian certified that no records responsive to the Complainant’s request exist, and the Complainant has failed to provide any evidence to contradict the Custodian’s certification. Therefore, the requested record cannot be released and there was no unlawful denial of access. *See* Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), wherein the Council determined that because the Custodian certified that no records responsive existed, no denial of access occurred.
3. Although the Custodian’s insufficient response to the Complainant’s OPRA request resulted in a deemed denial of access to the records relevant to this complaint, because the Custodian certified in her Statement of Information that no records responsive to the Complainant’s request exist, 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 actions appear to be 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 18th Day of December, 2008

Robin Berg Tabakin, 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: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Michael Hogan¹
Complainant**

GRC Complaint No. 2007-267

v.

**Township of Washington (Bergen)²
Custodian of Records**

Records Relevant to Complaint: All records pertaining to Ordinance #07-11 including scope of work, request for proposal, executive brief, vendor proposals, notes, lists of computer hardware, software and services for Ordinance 07-11.

Request Made: August 15, 2007

Response Made: August 17, 2007

Custodian: Mary Ann Ozment

GRC Complaint Filed: October 30, 2007

Background

August 15, 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.

August 17, 2007

Custodian's response to the OPRA request. The Custodian's designee, Secretary Fran Scordo, responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian's designee informs the Complainant that the Custodian is compiling information on several of the Complainant's OPRA requests, and that although the Custodian would soon be away on funeral leave, she will attend to the requests as soon as she returns.

August 23, 2007

Letter from the Complainant to the GRC. The Complainant states that he has not received a response to his OPRA request in a timely manner and he would like to institute a complaint.

August 28, 2007

Letter from the Custodian to the Complainant. The Custodian informs the Complainant she returned from an out-of-state funeral on August 23, 2007 and learned

¹ No legal representation listed on record.

² No legal representation listed on record.

that during her absence Councilman Charles Devine answered some of the Complainant's questions about the township's proposed hardware and software purchases. The Custodian informs the Complainant that the Councilman answered questions originating from several different OPRA requests submitted by the Complainant regarding Ordinance #07-11. The Custodian also informs the Complainant that she complied with OPRA because the August 17, 2007 response to the Complainant was within seven (7) business days of all of the Complainant's requests.

August 30, 2007

Letter from the Custodian to the Complainant. The Custodian forwards correspondence from Councilman Devine to the Complainant dated August 30, 2007. The Councilman answers several questions the Complainant had asked in the course of submitting twelve (12) other OPRA requests. None of the Councilman's answers were prompted by the request which gave rise to the instant complaint; therefore they are not relevant to it.³

August 31, 2007

Letter from the Complainant to the Custodian. The Complainant restates the records relevant to this complaint and states that, if and when they are produced, he wants to inspect them at a mutually convenient time.

October 30, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated August 15, 2007
- Letter from the Complainant to the GRC dated August 23, 2007
- Letter from the Complainant to the Custodian dated August 31, 2007

The Complainant alleges that the seven (7) day time period for a response to his August 15, 2007 OPRA request has expired but the records he requested were never produced by the Custodian.

November 2, 2007

Offer of Mediation sent to both parties. The Complainant agrees to mediation. The Custodian did not respond to the offer of mediation within the time provided for a response.

November 15, 2007

Request for the Statement of Information sent to the Custodian.

November 21, 2007

Telephone call from the Custodian to the GRC. The Custodian states that she did not receive the request for the Statement of Information ("SOI") until November 19, 2007

³ The Custodian provided the GRC with other correspondence between Councilman Devine and the Complainant that expands upon and/or clarifies proposed computer equipment purchases; however, the Councilman's responses were prompted by other OPRA requests filed by the Complainant which are not the subject of this complaint and therefore not relevant to it.

because she was attending a League of Municipalities conference. The Custodian said she would send the completed SOI to the GRC on November 27, 2007.

November 27, 2007

Custodian's SOI with the following attachments:⁴

- Complainant's OPRA request dated August 15, 2007
- Custodian's Response to the OPRA request dated August 17, 2007
- Letter from the Custodian to the Complainant dated August 28, 2007
- Letter from the Complainant to the Custodian dated August 31, 2007
- Copy of Township of Washington Ordinance No. 07-11

The Custodian certifies that there are no records responsive to the Complainant's OPRA request; however, she states that she spoke with Councilman Charles Devine whom she knew was looking into computer hardware and software for the town. The Custodian certifies that the Councilman asked her for the Complainant's requests which she provided to him.

Because the Custodian certifies that she was unable to locate any records responsive to the Complainant's request, she cannot provide a retention schedule in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian further certifies that she has been serving as the township clerk since 2003 and never had any records destroyed.

The Custodian certifies that when she returned from funeral leave on August 23, 2007, she learned that Councilman Devine had written to the Complainant.⁵ The Custodian certifies that she sent a letter to the Complainant dated August 28, 2007, wherein the Custodian informed the Complainant she returned from funeral leave and learned that Councilman Devine sent the Complainant a letter in reply to his several OPRA requests, including the request giving rise to this complaint, concerning Ordinance #07-11.

November 28, 2007

Letter from the Complainant to the GRC. The Complainant states that the Custodian sent the GRC a pile of irrelevant papers attached to the Custodian's SOI and that only one OPRA request seeks the records relevant to this complaint. The Complainant wants to know if the Custodian is asserting that she has no documents associated with a \$55,000 purchase.

⁴ Several attachments provided by the Custodian are not relevant to the instant complaint; therefore they are not listed here.

⁵ Because the Complainant's OPRA request was for records that the Custodian certifies do not exist, the Councilman's correspondence to the Complainant consisted of general information regarding the township's need for computer hardware and software.

December 14, 2007

E-mail from the GRC to the Complainant. The GRC replies to the Complainant's November 28, 2007 letter and advises the Complainant that the GRC understands which OPRA response gave rise to the instant complaint.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor 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 therefor ...” 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* provided that the record is currently available and not in storage or archived. 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. 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.

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. 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. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. N.J.S.A. 47:1A-5.g. The custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Custodian certifies receiving the Complainant’s OPRA request on August 15, 2007. The Custodian also certifies that a letter from her office dated August 17, 2007 went out to the Complainant concerning eight (8) OPRA requests that the Complainant had filed between August 13, 2007 and August 15, 2007. The Custodian certifies that one (1) of the eight (8) OPRA requests was the request for the records relevant to this complaint. The Custodian asserts that because her office responded to the Complainant’s August 15, 2007 OPRA request by letter dated August 17, 2007, she is not in violation of OPRA. Conversely, the Complainant contends that his August 15, 2007 request went unanswered by the Custodian.

The record reveals that a letter to the Complainant dated August 17, 2007 was prepared by Secretary Fran Scordo. The letter is titled “OPRA Requests” but it fails to identify any OPRA request by date, type of record requested, control number (if applicable) or any other descriptive criteria. The letter never states how long the Custodian will be indisposed or when the Complainant can expect to obtain the information. Further, the letter never identifies for which OPRA request(s) the information is being compiled and/or if any of the requested records will be denied, and if so, for what reason(s). The letter sent to the Complainant from the Custodian’s designee fails to grant access, deny access, seek clarification or request an extension of time; therefore it is an insufficient response to the Complainant’s OPRA request.

Moreover, sometime between the date of the Complainant’s OPRA request and August 23, 2007, Councilman Charles Devine sent an undated letter to the Complainant, wherein the Councilman answered questions about the township’s proposed hardware and software purchases. Although Councilman Devine stated in the letter that it was to serve as a response to seven (7) of the Complainant’s OPRA requests, the letter merely

lists the township's anticipated computer system purchases and procedures. The list compiled by the Councilman did not address the records responsive to the Complainant's request.⁶ Accordingly, even if the Councilman's letter complied with the time constraints imposed by N.J.S.A. 47:1A-5.i., it would fail to otherwise satisfy the provisions of N.J.S.A. 47:1A-5.g., and thus constitute an insufficient response.

Additionally, the Custodian, in her letter to the Complainant dated August 28, 2007, informed the Complainant that she returned from her funeral leave on August 23, 2007 and reviewed the status of his requests. The Custodian, upon her return, still could have cured the deficient August 17, 2007 response to the Complainant's OPRA request in a timely manner, but failed to do so.

The Custodian did not address the records relevant to this complaint set forth in the Complainant's August 15, 2007 OPRA request and has thereby failed to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a "deemed" denial of the Complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Notwithstanding the Custodian's "deemed denial," the Custodian certified that no records responsive to the Complainant's request exist, and the Complainant has failed to provide any evidence to contradict the Custodian's certification. Therefore, the requested records cannot be released and there was no unlawful denial of access. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), wherein the Council determined that because the Custodian certified that no records responsive existed, no denial of access occurred.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If 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,

⁶The Councilman indirectly addressed a part of the Complainant's request by informing the Complainant that purchases would be made under State Contract; thereby abrogating the need for certain records that would have been responsive to the Complainant's request. But such a response fails to satisfy the provisions of N.J.S.A. 47:1A-5.i.

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 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).

Although the Custodian’s insufficient response to the Complainant’s OPRA request resulted in a deemed denial of access to the records relevant to this complaint, because the Custodian certified in her SOI that no records responsive to the Complainant’s request exist, 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 actions appear to be 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 failed to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a “deemed” denial of the Complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Notwithstanding the Custodian’s “deemed denial,” the Custodian certified that no records responsive to the Complainant’s request exist, and the Complainant has failed to provide any evidence to contradict the Custodian’s certification. Therefore, the requested record cannot be released and there was no unlawful denial of access. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), wherein the Council determined that because the Custodian certified that no records responsive existed, no denial of access occurred.
3. Although the Custodian’s insufficient response to the Complainant’s OPRA request resulted in a deemed denial of access to the records relevant to this complaint, because the Custodian certified in her Statement of Information

that no records responsive to the Complainant's request exist, 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 actions appear to be negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008