



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

FINAL DECISION

April 25, 2007 Government Records Council Meeting

Barbara Skinner
Complainant

Complaint No. 2007-85

v.

City of Cape May
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 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’s actions, most notably the eighteen (18) business days it took for her to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

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 25th Day of April, 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, Secretary
Government Records Council

Decision Distribution Date: May 1, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Barbara Skinner¹
Complainant**

GRC Complaint No. 2007-85

v.

**City of Cape May²
Custodian of Records**

Records Relevant to Complaint: Any records showing what fines, if any, were collected from Congress Hall regarding the violation of the height requirements for tents and cabanas on Congress Beach.

Request Made: February 13, 2007.

Response Made: March 19, 2007.

Custodian: Diane L. Weldon

GRC Complaint Filed: March 27, 2007.

Background

February 13, 2007

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

March 19, 2007

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the eighteenth (18th) business day following receipt of such request. The Custodian provided the Complainant with two (2) letters showing that Congress Hall has been fined for violating signage regulations and the mercantile code. The Custodian verbally informed the Complainant that no fines have been imposed on Congress Hall regarding the violation of the height requirements for tents or cabanas on Congress Beach.

March 27, 2007

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

- Complainant's OPRA records request dated February 13, 2007, and
- Letters showing the fines imposed on Congress Hall.³

¹ No attorney is listed in the file.

² No attorney is listed in the file.

³ The Complainant provided the GRC with additional submissions which are not relevant to the adjudication of this complaint.

The Complainant asserts that she submitted an OPRA request to the Custodian on February 13, 2007. The Complainant further asserts that on March 19, 2007, the Custodian provided the Complainant with two documents showing that Congress Hall was fined for violating signage regulations and the mercantile code, neither of which were responsive to the Complainant's OPRA request.

March 30, 2007

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

April 4, 2007

Letter from the Custodian to the GRC. The Custodian provides the GRC with a legal certification stating that there are no records responsive to the Complainant's OPRA request. The Custodian further certifies that the Complainant was verbally informed that there are no records responsive to this request on March 19, 2007 upon Complainant's receipt of two documents showing that Congress Hall has been fined for violating signage regulations and the mercantile code.

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.

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 asserts that she submitted an OPRA request to the Custodian on February 13, 2007. The Complainant further asserts that on March 19, 2007, eighteen (18) business days later, the Custodian provided the Complainant with two documents showing that Congress Hall had been fined for violating signage regulations and the mercantile code, neither of which were responsive to the Complainant’s OPRA request.

The Custodian provides the GRC with a legal certification stating that there are no records responsive to the Complainant’s OPRA request. The Custodian further certifies that the Complainant was verbally informed that there are no records responsive to this request on March 19, 2007 upon Complainant’s receipt of two documents showing that Congress Hall was fined for violating signage regulations and the mercantile code.

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.

Because the Custodian failed to provide the Complainant with a written response to her February 13, 2007 OPRA request within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g., thereby creating a “deemed” denial.

Whether the delay in response to the records request 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 Complainant asserts that she submitted an OPRA request to the Custodian on February 13, 2007. The Complainant further asserts that on March 19, 2007, eighteen (18) business days later, the Custodian provided the Complainant with two documents showing that Congress Hall had been fined for violating signage regulations and the mercantile code, neither of which were responsive to the Complainant’s OPRA request.

The Custodian provided the GRC with a legal certification stating that there are no records responsive to the Complainant’s OPRA request. The Custodian further certified that the Complainant was verbally informed that there are no records responsive to this request on March 19, 2007, upon Complainant’s receipt of two documents showing that Congress Hall was fined for violating signage regulations and the mercantile code.

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).

The evidence of record indicates that the Custodian violated OPRA by failing to provide a response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days. The Custodian’s actions, most notably the eighteen (18) business days it took for her to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find 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’s actions, most notably the eighteen (18) business days it took for her to respond to the Complainant’s OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Prepared By:

Rebecca Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007