



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

February 25, 2009 Government Records Council Meeting

Leon Wilk
Complainant

Complaint No. 2008-05

v.

Borough of Avalon (Cape May)
Custodian of Record

At the February 25, 2009 public meeting, the Government Records Council (“Council”) considered the February 18, 2009 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. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of the anticipated date of availability of the requested record, the Custodian’s November 29, 2008 written response to the Complainant’s request is insufficient pursuant to N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. Because the Custodian responded in writing to the Complainant’s OPRA request within the seven (7) business days mandated by OPRA and because the Custodian has certified that she provided the Complainant with the record requested in the medium requested as soon the record became available, nineteen (19) business days after the Custodian indicated that access would be delayed in order to convert the record to the medium requested, 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 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 25th Day of February, 2009

Robin Berg Tabakin, Chair
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: March 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2009 Council Meeting**

**Leon Wilk¹
Complainant**

GRC Complaint No. 2008-5

v.

**Borough of Avalon (Cape May)²
Custodian of Records**

Records Relevant to Complaint: One (1) electronic copy of the current code book for the Borough of Avalon.³

Request Made: November 26, 2007

Response Made: November 29, 2007

Custodian: Amy Kleuskens

GRC Complaint Filed: December 26, 2007⁴

Background

November 26, 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. The Complainant forwards \$5.00 for copying costs.

November 29, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested record is granted pending confirmation of the Borough of Avalon's ability to provide the record in an electronic format. The Custodian states that she will follow up with the Complainant once the Mayor and Business Administrator provide her with the information necessary to proceed.

December 26, 2007

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

- Complainant's OPRA request dated November 26, 2007
- Receipt for \$5.00 fee for copy of code book

¹ No legal representation listed on record.

² Represented by Stephen D. Barse, Esq. (Vineland, NJ).

³ The Complainant provided a writeable CD and a writeable DVD disc with his OPRA request.

⁴ The GRC received the Denial of Access Complaint on said date.

The Complainant states that he discussed the details of the November 26, 2007 OPRA request with the Custodian and was told that the Custodian contact him shortly regarding the current OPRA request. The Complainant declines mediation.

February 29, 2008

Request for the Statement of Information sent to the Custodian.

March 17, 2008

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of the SOI deadline. The Custodian's Counsel states that it was never the Custodian's intent to deny the Complainant access to the record requested. The Custodian's Counsel further states that the requested record was provided in the medium requested on December 28, 2007. The Custodian's Counsel also states that the extension will not delay access by the Complainant because the record requested has already been provided.

March 17, 2008

E-mail from the GRC to the Custodian. The GRC extends the Custodian's SOI deadline until March 24, 2008.

March 18, 2008

E-mail from the Complainant to the GRC. The Complainant acknowledges receipt of a December 28, 2007 letter from the Borough of Avalon which accompanied the record requested. The Complainant argues that two documented acts of non-compliance without any explanation from the Custodian suggest repeated malice aforethought. The Complainant requests that the GRC pursue this matter as far as necessary to avoid future violations by the Borough.

March 24, 2008

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated November 26, 2007. The Custodian certifies that the record requested is not kept in electronic format. The Custodian further certifies that she provided the Complainant with an interim verbal report stating that there would be a delay in fulfilling the request due to staff shortages, holidays and the budget duties of the Chief Financial Officer, who is responsible for converting the document into the medium requested. The Custodian certifies that she did not know the procedure required to convert the record and had to consult with other Borough employees.

The Custodian certifies that on November 29, 2007, she informed the Complainant via e-mail that she would be consulting with the Township Administration regarding the record conversion. The Custodian certifies that due to unforeseen delays, the record was not converted as quickly as she had hoped which delayed fulfillment of the OPRA request until December 28, 2007. The Custodian certifies that on December 28, 2007, she sent the Complainant an electronic copy of the record. The Custodian further certifies that she informed the Complainant that there was no charge for the record and she refunded the \$5.00 copying fee that he paid on November 26, 2007. The Custodian certifies that she has always taken OPRA requests very seriously and has tried to fulfill her duties promptly and efficiently. The Custodian certifies that this is the only

Denial of Access Complainant that has been filed against her. The Custodian certifies that in light of the staff shortage, she honestly thought that she acted with all due diligence in fulfilling the Complainant's OPRA request.

December 23, 2008

GRC telephone call to the Custodian. The GRC requests a copy of the Custodian's November 29, 2007 response to the Complainant's OPRA request.

December 23, 2008

Facsimile from the Custodian to the GRC. The Custodian provides a copy of her November 29, 2007 response to Complainant's OPRA request.

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 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 also provides 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 thereof ...If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” 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* ... *The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. 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. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, N.J.S.A. 47:1A-5.i. provides that a custodian must inform the requestor when the requested records will be made available and that failure to provide the records by such date results in a “deemed” denial.

In Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the custodian requested an extension of time to fulfill said request but failed to notify the complainant of when the requested records would be made available. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley [v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007)].”

The facts of this current complaint are similar to those in Hardwick, *supra*. Specifically, the Custodian in this instant matter provided a written response to the Complainant's request on the third (3rd) business day following receipt of the Complainant's OPRA request, but failed to provide a date upon which the requested record would be provided to the Complainant.

Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of the anticipated date of availability of the requested record, the Custodian's November 29, 2008 written response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Whether the Custodian's delay in access to the requested record 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, 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 (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, 107 (App. Div. 1996).

The Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days. The Custodian requested an extension of time to fulfill said request but failed to provide an anticipated deadline date as to when the requested record would be made available. The Custodian provided the Complainant with the record requested in the medium requested on December 28, 2007, nineteen (19) business days after the Custodian indicated that access would be delayed in order to convert the record to the medium requested.

Because the Custodian responded in writing to the Complainant's OPRA request within the seven (7) business days mandated by OPRA and because the Custodian has certified that she provided the Complainant with the record requested in the medium requested as soon the record became available, nineteen (19) business days after the Custodian indicated that access would be delayed in order to convert the record to the medium requested, 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 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. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of the anticipated date of availability of the requested record, the Custodian's November 29, 2008 written response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
2. Because the Custodian responded in writing to the Complainant's OPRA request within the seven (7) business days mandated by OPRA and because the Custodian has certified that she provided the Complainant with the record requested in the medium requested as soon the record became available, nineteen (19) business days after the Custodian indicated that access would be delayed in order to convert the record to the medium requested, 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 negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director
February 18, 2009