



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

ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Santiago Zayas
Complainant

Complaint No. 2008-31

v.

City of Trenton (Mercer)
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 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 did not respond to the Complainant’s OPRA request for the record relevant to this complaint until December 7, 2007, eleven (11) business days following receipt of the Complainant’s November 16, 2007 OPRA request. Therefore, 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).
2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days when the requested record would be made available, the Custodian’s December 7, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Although the evidence of record shows that the Custodian made several attempts to obtain the record from the Trenton Police Department, the Department’s confusion as to the location of the record materially hindered the Complainant’s right of public access to government records as set forth in N.J.S.A. 47:1A-1. This hindrance should not be borne by a requestor.



N.J.S.A. 47:1A-1 (“any limitations on the right of access... should be construed in favor of the public’s right of access.”)

4. Although the Custodian’s untimely response resulted in a “deemed” denial of access in this complaint, the evidence of record shows that the Custodian made several attempts to obtain the requested record from the Trenton Police Department, who hindered the Complainant’s right to access by not being able to locate the requested record in a sufficient amount of time, and certified that no record responsive was available. Therefore, 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 30th Day of July, 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: August 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Santiago Zayas¹
Complainant**

GRC Complaint No. 2008-31

v.

**City of Trenton (Mercer)²
Custodian of Records**

Records Relevant to Complaint: A copy of a picture taken from an overhead camera of an incident relating to a traffic violation at the intersection of Perry and Montgomery Streets on November 13, 2007 at 8:20 pm.

Request Made: November 16, 2007

Response Made: December 7, 2007

Custodian: Juanita M. Joyner

GRC Complaint Filed: February 2, 2008

Background

November 16, 2007

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

December 7, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eleventh (11th) business day following receipt of such request. The Custodian requests an extension of time to respond to the Complainant's OPRA request.

January 18, 2008

Letter from the Custodian to the Complainant. The Custodian states that the Trenton Police Department has informed the Custodian that the video from November 13, 2007 is no longer available.

February 2, 2008

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

¹ No legal representation listed on record.

² Represented by Joseph A. Alacqua, Esq. (Turnersville, NJ).

- Complainant's OPRA request dated November 16, 2007.
- Letter from the Custodian to the Complainant dated December 7, 2007.
- Letter from the Custodian to the Complainant dated January 18, 2008.

The Complainant states that he submitted an OPRA request to the Custodian on November 16, 2007. The Complainant states that he received a written response from the Custodian on December 7, 2007 requesting an extension of time to respond to the OPRA request. The Complainant states that on January 18, 2008, the Custodian responded stating that the requested record is not available.

The Complainant did not agree to mediate this complaint.

February 26, 2008

Request for the Statement of Information sent to the Custodian.

March 5, 2008

Telephone call from the GRC to the Custodian. The GRC is advised by the Custodian that she never received the GRC's request for a Statement of Information.

March 5, 2008

E-mail from the GRC to the Custodian. The GRC states that the Custodian's Statement of Information was due by close of business on March 4, 2008. The GRC states that the proper documentation is being re-sent to the Custodian. The GRC grants the Custodian an extension until March 11, 2008 to file the Statement of Information.

March 11, 2008

E-mail from the Custodian to the GRC. The Custodian requests additional time to respond to the GRC's request for the Statement of Information.

March 11, 2008

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension until March 18, 2008 to file the Statement of Information.

March 18, 2008

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

- Complainant's OPRA request dated November 16, 2007.
- Letter from the Custodian to the Complainant dated December 7, 2007.
- Letter from the Custodian to the Complainant dated January 18, 2008.

The Custodian states that she received the Complainant's November 16, 2007 OPRA request on November 19, 2007 and immediately forwarded it to the Police Department. The Custodian asserts that during that time, the Police Department sent the request to the Director of MIS Services³. The Custodian states that she requested additional time to respond to the Complainant's request on December 7, 2007 because there was confusion in the Custodian's office as to who was in possession of the record.

³ MIS presumably means Management Information Systems.
Santiago Zayas v. City of Trenton, Police Department (Mercer), 2008-31 – Findings and Recommendations of the Executive Director

The Custodian asserts that the Director of MIS Services advised the Custodian on December 14, 2007 that the request should be handled through the Trenton Police Department Communications Center.

The Custodian avers that on December 14, 2007, Captain Fred Reister of the Trenton Police Department advised the Custodian that the request was forwarded by the Director of MIS Services to the Director of the Communications Center. The Custodian asserts Captain Reister further advised that the Director of Communications informed Captain Reister that the Director of Communications had not received the request from the Director of MIS Services.

The Custodian further avers that messages were left for Detective Charles Parrish and/or Detective George Merman, who according to a Police Records Department employee would be able to obtain the requested record, on December 14, December 17, December 18, December 19 and December 20, 2007. The Custodian further avers that she was later informed that Detective Parrish was on vacation for an undisclosed amount of time.

The Custodian alleges that on January 7, 2008, a copy of the Complainant's November 16, 2007 OPRA request was forwarded to the Director of the Communications Center, who directed Detective Parrish to research the video data to see if the requested record could be obtained. The Custodian certifies Captain Reister advised that Detective Parrish could not recover the requested record because the video containing the requested record was deleted on December 13, 2007 because video files are overwritten after thirty (30) days to preserve hard drive space.

The Custodian asserts that the Police Department sent a memo to the Custodian stating that the video from November 13, 2007 is no longer available and that no photos can be produced in response to the Complainant's request. The Custodian states that the Complainant was notified of this on January 18, 2008.

The Custodian contends that she did everything possible to obtain the requested record. The Custodian avers that a structural relocation of the Communication Center from one department to another caused a delay that resulted in the record being destroyed.

Analysis

Whether the Custodian unlawfully denied access to the requested photo?

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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....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:

“a custodian of a government record shall grant access to a government record or deny access to a government record 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....the requestor shall be advised....when the record can be made available... [and] if the record is not made available by that time, access shall be deemed denied.” 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.⁴ A custodian's failure to respond in writing to a 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. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the complaint now before the GRC, the Custodian did not respond to the Complainant's OPRA request for the record relevant to this complaint until December 7, 2007, eleven (11) business days following receipt of the Complainant's November 16, 2007 OPRA request. Therefore, 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).

Moreover, the Custodian's December 7, 2007 request for an extension failed to specify a date on which the records would be provided. N.J.S.A. 47:1A-5.i. states that if a custodian is unable to provide a record because it is in storage or archived, then the custodian must request an extension of time to fulfill the request and provide a date on which the record will be made available. Additionally, N.J.S.A. 47:1A-5.i. provides that if the custodian should fail to provide the requested record by the new deadline, then access will be deemed denied.

In Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian responded in writing to the Complainant on the seventh (7th) business day requesting an extension of time to respond to the Complainant's request. The Custodian initially failed to provide a specific date on which the requested records would be available for disclosure. The GRC held that the Custodian's request for an extension of time to respond to the Complainant's OPRA request was inadequate and resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra, because the Custodian failed to provide a date on which the records would be made available for the Complainant.

In the complaint now before the Council, the Custodian sought an extension on the eleventh (11th) 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. Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days when the requested record would be made available, the Custodian's December 7, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick, supra.

⁴ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

At the time that the Complainant made his November 16, 2007 OPRA request for the record relevant to this complaint, the record did exist. However, in the course of the substantial delay resulting from confusion within the Trenton Police Department as to the location of the requested record, the record was subsequently destroyed on December 13, 2007. Although the evidence of record shows that the Custodian made several attempts to obtain the record from the Trenton Police Department, the Department's confusion as to the location of the record materially hindered the Complainant's right of public access to government records as set forth in N.J.S.A. 47:1A-1. This hindrance should not be borne by a requestor. N.J.S.A. 47:1A-1 ("any limitations on the right of access... should be construed in favor of the public's right of access.")

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, 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)).

Although the Custodian's untimely response resulted in a deemed denial of access in this complaint, the evidence of record shows that the Custodian made several attempts to obtain the requested record from the Trenton Police Department, who hindered the Complainant's right to access by not being able to locate the requested record in a

sufficient amount of time, and certified that no record responsive was available. Therefore, 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 did not respond to the Complainant's OPRA request for the record relevant to this complaint until December 7, 2007, eleven (11) business days following receipt of the Complainant's November 16, 2007 OPRA request. Therefore, 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).
2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days when the requested record would be made available, the Custodian's December 7, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Although the evidence of record shows that the Custodian made several attempts to obtain the record from the Trenton Police Department, the Department's confusion as to the location of the record materially hindered the Complainant's right of public access to government records as set forth in N.J.S.A. 47:1A-1. This hindrance should not be borne by a requestor. N.J.S.A. 47:1A-1 ("any limitations on the right of access... should be construed in favor of the public's right of access.")
4. Although the Custodian's untimely response resulted in a "deemed" denial of access in this complaint, the evidence of record shows that the Custodian made several attempts to obtain the requested record from the Trenton Police Department, who hindered the Complainant's right to access by not being able to locate the requested record in a sufficient amount of time, and certified that no record responsive was available. Therefore, 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: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2008