



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

February 25, 2009 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2008-72

v.

Borough of South Bound Brook (Somerset)
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. The Custodian’s failure to respond in writing to the 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). However, the Custodian would not have unlawfully denied access if he responded within the appropriate time frame because no records responsive to the Complainant’s request exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because 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 unlawful “deemed” denial of access appears negligent and heedless since he 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 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2008-72

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: All RICE Notices served upon Chief Robert A. Verry between September 1, 2007 and February 29, 2008.

Request Made: March 20, 2008

Response Made: April 8, 2008

Custodian: Donald E. Kazar

GRC Complaint Filed: April 3, 2008³

Background

March 20, 2008

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.

March 21, 2008

E-mail from Custodian to Complainant. The Custodian asks the Complainant to send all future correspondence via regular mail because the Borough is rebuilding its computer system and at times it may be down and not receiving e-mails.

March 22, 2008

E-mail from Complainant to Custodian. The Complainant asks whether the Custodian received his OPRA request dated March 20, 2008.

March 30, 2008

E-mail from Complainant to Custodian. The Complainant seeks the status of his OPRA request.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

April 3, 2008

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

- Complainant’s OPRA request dated March 20, 2008
- E-mail from Custodian to Complainant dated March 21, 2008
- E-mail from Complainant to Custodian dated March 22, 2008
- E-mail from Complainant to Custodian dated March 30, 2008

The Complainant states that he submitted his OPRA request on March 20, 2008. The Complainant states that he received the Custodian’s e-mail dated March 21, 2008 in which the Custodian indicated that he may not have received all of the Complainant’s e-mails. The Complainant states that via e-mail dated March 22, 2008, he asked the Custodian to confirm whether he received the Complainant’s OPRA request. The Complainant states that he sought the status of his request via e-mail dated March 30, 2008, which he claims the Custodian read on March 31, 2008. Additionally, the Complainant states that on March 27, 2008, the Custodian advised the GRC in response to another Denial of Access Complaint that he would be out of the office until April 7, 2008. However, the Complainant claims that the Custodian responded to another OPRA request on March 31, 2008. The Complainant states that to date he has not received a response to his OPRA request. Further, the Complainant did not agree to mediate this complaint.

April 4, 2008

E-mail from Custodian to Complainant. The Custodian states that he was under the assumption that the Complainant received the response by mail as with the responses to other OPRA requests. The Custodian states that if the Complainant did not receive said response, he will resend it to the Complainant.

April 5, 2008

E-mail from Complainant to Custodian. The Complainant states that, as indicated in his Denial of Access Complaint, he has not received a response to his OPRA request.

April 5, 2008

E-mail from Custodian to Complainant. The Custodian states that it is his position that he responded to the request within the appropriate time frame. The Custodian states that he will forward this information to the GRC.

April 8, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the twelfth (12th) business day following receipt of such request.⁴ The Custodian states that no RICE notices were served upon Chief Robert Verry between September 1, 2007 and February 29, 2008.

⁴The Custodian certifies in his Statement of Information that he received the Complainant’s OPRA request on March 22, 2008.

April 11, 2008

Request for the Statement of Information sent to the Custodian.

April 18, 2008

E-mail from Custodian to GRC. The Custodian requests an extension of time to submit his completed Statement of Information.

April 18, 2008

E-mail from GRC to Custodian. The GRC grants the Custodian a five (5) business day extension of time to submit his completed Statement of Information.

April 21, 2008

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

- Complainant's OPRA request dated March 20, 2008
- Custodian's response to the OPRA request dated April 8, 2008

The Custodian certifies that he received the Complainant's OPRA request on March 22, 2008. The Custodian certifies that he provided the Complainant with a written response to said request on April 8, 2008 in which he indicated that no records responsive exist. The Custodian asserts that the Complainant was aware that he was out of the office for surgery as indicated by the March 27, 2008 e-mail discussed by the Complainant in his Denial of Access Complaint. Additionally, the Custodian certifies that his search for the requested records involved reviewing the meeting minutes for the time period requested for any indication of RICE Notices.

April 24, 2008

The Complainant's response to the Custodian's SOI with the following attachments:

- E-mail from Custodian to Complainant dated April 4, 2008
- E-mail from Complainant to Custodian dated April 5, 2008
- E-mail from Custodian to Complainant dated April 5, 2008⁵

The Complainant states that it is the Custodian's position that he responded to the Complainant's OPRA request within the appropriate time frame. However, the Complainant asserts that the Custodian's submission to the GRC contradicts said position. Additionally, the Complainant asserts that although the Custodian attempts to rationalize his delay in responding to the Complainant's OPRA requests because the Custodian was out of the office on surgery leave until April 7, 2008, the fact that the Custodian responded to another OPRA request on March 31, 2008 undermines the Custodian's justification.

⁵ The Complainant attaches additional e-mails which are not relevant to the adjudication of this complaint. Robert A. Verry v. Borough of South Bound Brook (Somerset), 2008-72 – Findings and Recommendations of the Executive Director 3

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 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 ...” N.J.S.A. 47:1A-5.g.

Further, 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.

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, 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).

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

The Custodian in this complaint certified that he received the Complainant's OPRA request on March 22, 2008. The Custodian also certified that he provided the Complainant with a written response to said request on April 8, 2008, the twelfth (12th) business day following the Custodian's receipt of said request, in which the Custodian denied access to the requested records on the basis that no records responsive exist. However, the Custodian claims that he sent a written response to the Complainant's request within the statutorily mandated seven (7) business days, but has failed to provide the GRC with any evidence of said response.

Therefore, in this instant complaint, the Custodian's failure to respond in writing to the 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, *supra*. However, the Custodian would not have unlawfully denied access if he responded within the appropriate time frame because no records responsive to the Complainant's request exist. See Pusterhofer, *supra*.

Whether the Custodian's actions rise 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.

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days either granting access, denying access, seeking clarification or requesting an extension of time. The Custodian claimed that he responded within the appropriate time frame but failed to provide any evidence of same to the GRC. However, no records responsive to the Complainant’s OPRA request exist.

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 failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because 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 unlawful “deemed” denial of access appears negligent and heedless since he 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 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). However, the Custodian would not have unlawfully denied access if he responded within the appropriate time frame because no records responsive to the Complainant's request exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

2. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because 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 unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 18, 2009