



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

June 23, 2009 Government Records Council Meeting

Elaine Schiano
Complainant

Complaint No. 2008-90

v.

Township of Lower (Cape May)
Custodian of Record

At the June 23, 2009 public meeting, the Government Records Council (“Council”) considered the June 16, 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).
2. Pursuant to N.J.S.A. 47:1A-6. and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the record responsive to Request Item No. 2 because the Custodian mistakenly informed the Complainant that there were no records responsive to her request due to the Custodian insufficient search. See also Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009).
3. Because the Custodian, the Planning Director (William Gleastok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), have all certified that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant’s OPRA request, and there is no credible evidence in the record to refute these certifications, the Custodian has not unlawfully denied the Complainant access to records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. Although the Custodian violated N.J.S.A. 47:1A-5.i. by failing to respond in writing within seven (7) business days of receipt of the Complainant's OPRA request, granting access, denying access, requesting clarification or requesting an extension of time, thereby resulting in a "deemed" denial of the Complainant's OPRA request, and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request as soon as a record responsive to Request Item No. 2 of the Complainant's OPRA request was located. 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 "deemed" denial of access and insufficient search appears 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 23rd Day of June, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Kathryn Forsyth
Government Records Council

Decision Distribution Date: June 29, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 23, 2009 Council Meeting**

**Elaine Schiano¹
Complainant**

GRC Complaint No. 2008-90

v.

**Township of Lower (Cape May)²
Custodian of Records**

Records Relevant to Complaint:

1. Letter from Haven House or subcontractor to Township of Lower (“Township”) or Raymond Roberts,³ regarding clearing stakes at Haven House, dated February 20, 2007, February 21, 2007 or February 22, 2007.

2. Letter from Township or Raymond Roberts to Haven House giving permission to proceed with removal of trees, dated February 20, 2007, February 21, 2007 or February 22, 2007.

Request Made: April 4, 2008

Response Made: April 14, 2008

Custodian: Claudia Crammer

GRC Complaint Filed: May 19, 2008⁴

Background

April 4, 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.

April 14, 2008

Custodian’s response to the OPRA request. The Custodian responds via telephone to the Complainant’s OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that there are no records responsive to the Complainant’s OPRA request.

May 19, 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 Paul Baldini, Esq. (Wildwood, NJ).

³ Township Engineer.

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

- Complainant's OPRA request dated April 4, 2008
- Partial summary of the February 21⁵ Council Meeting
- Letter from Raymond Roberts to William Good dated February 20, 2007

The Complainant certifies that she submitted an OPRA request for the records relevant to this complaint. The Complainant states that the Custodian told her that no records responsive to the Complainant's OPRA request existed. The Complainant states that she asked the Custodian to consult with the recipient of the letters, Raymond Roberts. The Complainant states that she knows that a record responsive to Request Item No. 1 exists because she read the responsive record in July of 2007 during a meeting with the contractor and his attorney.

The Complainant agreed to mediate this complaint.

June 10, 2008

Offer of Mediation sent to the Custodian. The Custodian failed to respond to the Offer of Mediation.

June 23, 2008

E-mail from the GRC to the Custodian. The GRC requests a certification from the Custodian concerning the existence of the records responsive to the Complainant's OPRA request and the Custodian's efforts to fulfill the Complainant's OPRA request.

August 28, 2008

E-mail from the Custodian to the GRC. The Custodian indicates that the Planning Director found a fax cover sheet from the Township Engineer with handwritten comments that the Custodian believes is responsive to Request Item No. 2. The Custodian states that she immediately provided a copy of this record to the Complainant. The Custodian further states that she could not find a record responsive to Request Item No. 1.

September 19, 2008

Request for the Statement of Information sent to the Custodian.

September 23, 2008

Facsimile from the Custodian to the GRC. The Custodian provides the GRC with certifications from the Custodian, the Planning Director (William Galestok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), stating that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant's OPRA request.

October 10, 2008⁶

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

- Complainant's OPRA request dated April 4, 2008

⁵ The Complainant did not specify a year.

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

- Letter from Raymond Roberts to William Good dated February 22, 2007

The Custodian certifies that when she received the Complainant's OPRA request she forwarded copies of the request to the Township Manager's Office, Township Engineer, and the Township Planning Department, seeking whether those offices were in possession of records responsive to the request. The Custodian certifies that she also reviewed the files in her office which may contain correspondence on the matter. The Custodian certifies that the initial search revealed no records responsive to the Complainant's OPRA request. The Custodian certifies that the Planning Director's July 7, 2008 subsequent search of a financial file not previously searched revealed a fax cover sheet with handwritten notes from the Township Engineer which may be responsive to Request Item No. 2. The Custodian also certifies that she immediately provided the Complainant with a copy of the newly discovered record. The Custodian further certifies that upon finding the record, she asked each of the officials listed above to search their files once more. The Custodian certifies that no records responsive to Request Item No. 1 were located.

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:

"[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 the instant matter, the Custodian responded verbally to the Complainant’s OPRA request on the eighth (8th) business day after receipt of said request stating that no records responsive to the Complainant’s OPRA request exist.

Therefore, 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).

Although the Custodian informed the Complainant that no records responsive to either item of her request existed, a search later performed by the Planning Director uncovered a record responsive to Request Item No 2 which was provided to the Complainant immediately. Additionally, the Custodian certified that she requested that the Township Manager’s Office, Township Engineer, and the Township Planning Department search their files once more for records responsive to the request. The Custodian certified that no additional records were found by the subsequent searches.

In Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the custodian initially responded to the complainant’s OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails which were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records

responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records.

Like the custodian in Schneble, *supra*, the Custodian in the instant matter mistakenly informed the Complainant that there were no records responsive because the Custodian's search did not reveal the existence of the record, and a record responsive to Request Item No. 2 was discovered during a subsequent search. As in Schneble, *supra*, the Custodian in the instant matter disclosed the record to the Complainant as soon as she realized the existence of the responsive record.

Therefore, pursuant to N.J.S.A. 47:1A-6 and Schneble v. New Jersey Department of Environmental Protection, 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the record responsive to Request Item No. 2 because the Custodian mistakenly informed the Complainant that there were no records responsive to her request due to the Custodian's insufficient search. See also Oskay v. New Jersey State Parole Board, 2008-53 (March 2009).

However, the Custodian, the Planning Director (William Gleastok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), have all certified that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant's OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone records showing a call made to him from the New Jersey Department of Education. The custodian certified that no records responsive to the Complainant's request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Because the Custodian, the Planning Director (William Gleastok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), have all certified that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant's OPRA request, and there is no credible evidence in the record to refute these certifications, the Custodian has not unlawfully denied the Complainant access to records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 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.

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 violated N.J.S.A. 47:1A-5.i. by failing to respond in writing within seven (7) business days of receipt of the Complainant’s OPRA request, granting access, denying access, requesting clarification or requesting an extension of time, thereby resulting in a “deemed” denial of the Complainant’s OPRA request, and conducted an insufficient search in response to the Complainant’s request, the Custodian provided the Complainant with all records responsive to the request as soon as a record responsive to Request Item No. 2 of the Complainant’s OPRA request was located. 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 “deemed” denial of access and insufficient search appears 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’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).

2. Pursuant to N.J.S.A. 47:1A-6. and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the record responsive to Request Item No. 2 because the Custodian mistakenly informed the Complainant that there were no records responsive to her request due to the Custodian insufficient search. See also Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009).
3. Because the Custodian, the Planning Director (William Glalestok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), have all certified that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant's OPRA request, and there is no credible evidence in the record to refute these certifications, the Custodian has not unlawfully denied the Complainant access to records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5.i. by failing to respond in writing within seven (7) business days of receipt of the Complainant's OPRA request, granting access, denying access, requesting clarification or requesting an extension of time, thereby resulting in a "deemed" denial of the Complainant's OPRA request, and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request as soon as a record responsive to Request Item No. 2 of the Complainant's OPRA request was located. 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 "deemed" denial of access and insufficient search appears 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

June 16, 2009