



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

May 27, 2010 Government Records Council Meeting

Philip Charles
Complainant

Complaint No. 2009-113

v.

Plainfield Municipal Utilities Authority (Union)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 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) and DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007). Further, because the Custodian failed to immediately deny access to the requested records, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian certified in the Statement of Information that no quarterly sewer bills responsive to the Complainant’s OPRA request exist, and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a “deemed” denial and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant’s OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request for quarterly sewer bills, because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA 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.

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 27th Day of May, 2010

Robin Berg Tabakin, Chairman
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Philip Charles¹
Complainant**

GRC Complaint No. 2009-113

v.

**Plainfield Municipal Utilities Authority (Union)²
Custodian of Records**

Records Relevant to Complaint: Copies of Plainfield Municipal Utilities Authority (“PMUA”) quarterly bills for the following dates and addresses:

1. October 1, 2004 to December 31, 2004 – 1049 Field Avenue, 717 Stelle Avenue, 911 East Second Street, 1039-45 Rose Street and 525 West 5th Street.
2. October 1, 2005 to December 31, 2005 - 1049 Field Avenue, 717 Stelle Avenue, 911 East Second Street, 1039-45 Rose Street and 525 West 5th Street.
3. October 1, 2006 to December 31, 2006 - 1049 Field Avenue, 717 Stelle Avenue, 911 East Second Street, 1039-45 Rose Street and 525 West 5th Street.
4. October 1, 2007 to December 31, 2007 - 1049 Field Avenue, 717 Stelle Avenue, 911 East Second Street, 1039-45 Rose Street, 525 West 5th Street, 1315-17 Randolph Road and 1300 South 2nd Street.
5. October 1, 2008 to December 31, 2008 - 1049 Field Avenue, 717 Stelle Avenue, 911 East Second Street, 1039-45 Rose Street, 525 West 5th Street, 1315-17 Randolph Road and 1300 South 2nd Street.³

Request Made: March 23, 2009

Response Made: April 7, 2009

Custodian: Dollie S. Hamlin

GRC Complaint Filed: April 2, 2009⁴

Background

March 23, 2009

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.

¹ No legal representation listed on record.

² Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).

³ The Complainant requested an additional record which is not at issue in the instant complaint.

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

April 2, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated March 23, 2009.

The Complainant states that he submitted an OPRA request to the Plainfield Municipal Utilities Authority (“PMUA”) via facsimile on March 23, 2009. The Complainant states that his request was for twenty-seven (27) immediate access records. The Complainant asserts that he tried to contact the Custodian on March 30, 2009, March 31, 2009, April 1, 2009 and April 2, 2009. The Complainant states that the Custodian failed to return his telephone calls and did not respond to the Complainant’s request.

The Complainant agrees to mediate this complaint.

April 7, 2009

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 provides the Complainant with a computer generated printout of the “account status” containing information responsive to the Complainant’s request and charged the Complainant \$16.50 for reproduction of thirty-eight (38) pages.

April 9, 2009

Offer of Mediation sent to the Custodian.

April 15, 2009

The Custodian agrees to mediate this complaint.

April 16, 2009

Complaint referred to mediation.

November 17, 2009

Complaint referred back from mediation.

December 11, 2009

E-mail from the GRC to the Complainant. The GRC states that the Complainant may amend the instant complaint in the event that some issues were resolved during the mediation process and no longer require adjudication. The GRC states that if the Complainant wishes to submit an amended complaint, such is due by December 16, 2009.

December 15, 2009

Complainant’s amended denial of access complaint. The Complainant states that on April 7, 2009, the Custodian provided the Complainant with a computer generated printout of the “account status” containing information responsive to the Complainant’s request and charged the Complainant for thirty-eight (38) pages. The Complainant states that he e-mailed the Custodian on April 15, 2009 advising that the printouts provided

were not responsive to the Complainant's request for quarterly bills; thus, the printouts were of no use to the Complainant.⁵

The Complainant notes that he is trying to obtain specific details regarding the amount billed by the PMUA to the properties contained within his request. The Complainant states that he will only accept the quarterly bills unless the PMUA certifies that the information contained in the computer printouts is accurate. Further, the Complainant states that he will also accept payment stubs as responsive records, which should be maintained by the PMUA for six (6) years pursuant to the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"). The Complainant requests that the PMUA also refund the copying cost of \$16.50 that the Complainant submitted for receipt of the computer printouts, which were not responsive to his request.

December 18, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

December 21, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel confirms that the GRC has granted an extension until December 31, 2009 to submit the requested SOI.

December 22, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC acknowledges that it has granted an extension until December 31, 2009 to submit the requested SOI.

December 30, 2009

Custodian's SOI attaching the Complainant's OPRA request dated March 23, 2009.⁶

The Custodian certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by DARM.⁷

⁵ The Complainant included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

⁶ The Custodian also included correspondence between the parties while this complaint was in mediation.

⁷ The Custodian certifies that the search undertaken to find records responsive to the Complainant's request is not applicable in the instant complaint.

The Custodian certifies that she received the Complainant's OPRA request on March 23, 2009. The Custodian certifies that because no quarterly bills responsive to the Complainant's request existed at the time of the request, the Custodian provided the Complainant with a computer printout known as the "customer account record" on April 7, 2009.

The Custodian asserts that the fact that no records responsive to the Complainant's OPRA request existed at the time of the request renders the instant complaint moot.

The Custodian states that the GRC's Handbook for Records Custodians, 2nd Edition (August 2002) provides that OPRA does not require that a record be created in order to respond to a request for government records.⁸ The Custodian states that this principle has been constant from 2002 to the present, as evidenced by the GRC's recent administrative disposition in Smith v. N.J. Department of Corrections, GRC Complaint No. 2009-140 (June 2009)(the GRC administratively dismissed this complaint based on the fact that no records responsive existed). *See also* Brower v. Township of Chatham, GRC Complaint No. 2003-30 (September 2003).

The Custodian certifies that the records sought by the Complainant do not exist and never existed; therefore, there has been no unlawful denial of access under OPRA. The Custodian avers that although no records responsive existed, the Custodian still undertook the task of responding in writing to the Complainant on April 7, 2009 advising that no records responsive existed and providing a meaningful alternative to the Complainant.⁹ The Custodian notes that the Complainant states in his amended Denial of Access Complaint that he would accept, as an alternative to twenty-seven (27) quarterly bills, sewer bill stubs or a certification that the "customer account record" accurately reflects the information contained in the computer printouts is accurate. The Custodian states that it is impossible for her to certify to the accuracy of the information contained in the "customer account record" because no quarterly sewer bills ever existed which she could compare to the printout.

The Custodian reiterates that although no records responsive to the Complainant's OPRA request exist and although the Custodian was under no obligation to create or locate a record that may satisfy the Complainant's request, she still undertook to do so. The Custodian asserts that her good faith effort to satisfy the Complainant's request has complicated the instant matter. Finally, the Custodian contends that had the Custodian simply denied access to the Complainant's OPRA request stating that no records responsive exist, this complaint would have long since been resolved without an occurrence of an OPRA violation.

⁸ The Handbook for Records Custodians, currently in its third edition, was updated October 2009.

⁹ The evidence of the record shows that the Custodian did not provide written notification to the Complainant that no quarterly bills responsive existed; rather, the evidence of record suggests that the Custodian may have verbally advised the Complainant of such upon providing the Complainant with the "customer account record." *See* Letter from the Custodian's Counsel to the GRC dated March 15, 2010. Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-113 – Findings and Recommendations of the Executive Director 4

March 12, 2010

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the SOI and is in need of additional information. The GRC states that in the SOI, the Custodian asserts that she responded in writing to the Complainant on April 7, 2009 advising the Complainant that no quarterly bill responsive to the Complainant's request exist. The GRC states that a copy of this correspondence was not provided with the SOI. The GRC requests that the Custodian provide a copy of the letter dated April 7, 2009 by March 12, 2010.

March 12, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until March 16, 2010 to submit a response.

March 12, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until March 16, 2010 to provide a response.

March 15, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that April 7, 2009 represents the date that the Custodian personally handed the Complainant a copy of the "customer account status" containing all the information that would have existed in the requested quarterly sewer bills. Counsel notes that this fact is confirmed by the Complainant in a letter to the Custodian dated June 24, 2009.¹⁰

Counsel states that the Custodian asserts that she verbally advised the Complainant on April 7, 2009 that no quarterly bills exist. Counsel further states that the Custodian asserts that she also informed the Complainant of this fact several other times during the initial seven (7) business day time frame after the Custodian's receipt of the OPRA request.

Counsel acknowledges that OPRA provides that a custodian's failure to respond to an OPRA request in writing within the statutorily mandated seven (7) business days results in a "deemed" denial of said request. N.J.S.A. 47:1A-5.i. Further, Counsel acknowledges that OPRA provides that a monetary penalty of \$1,000.00 can be imposed on a custodian found to have knowingly and willfully violated OPRA under the totality of the circumstance. N.J.S.A. 47:1A-11. Counsel provides the following arguments supporting that the Custodian's response does not constitute a "deemed" denial nor did she knowing and willfully violate OPRA.

Counsel states that OPRA provides that a government record means, "any paper ... or any copy thereof that has been made, maintained or kept on file..." N.J.S.A. 47:1A-1.1. Counsel states that the documents requested by the Complainant never existed. Counsel states that once quarterly bills are sent to the customers, no copies thereof are

¹⁰ In said letter, the Complainant asserted that the first time he was made aware that no quarterly bills existed was through a letter from the Custodian dated April 28, 2009. Counsel argues that although the April 28, 2009 letter represents the first time the Complainant was notified in writing that no records responsive exist, the Custodian verbally advised the Complainant of such on April 7, 2009.

maintained or kept on file. Counsel asserts that based on the foregoing, it is debatable as to whether a copy of the quarterly sewer bills are considered a government record.

Counsel asserts that the nonexistence of the requested records raises the question of whether the documents sought are even encompassed by OPRA. Counsel states that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court stated that:

“... when a request is complex because it fails to specifically identify the documents sought, *then that request is not encompassed by OPRA and OPRA deadlines do not apply.*” (Emphasis added.) *Id.* at ___.

Counsel asserts that he recognizes the facts of this complaint do not involve a request consistent with that in NJ Builders. Counsel argues that he believes the facts of this complaint involve more extreme circumstances: the records responsive do not exist. Counsel argues that by analogy, the principle enunciated by the court in NJ Builders, *supra*, should apply in this complaint as well. Counsel asserts that the Custodian could have responded in writing within seven (7) business days (as opposed to verbally); however, if a nonexistent record is not encompassed by OPRA, then OPRA deadlines would not apply either.

Counsel further argues that the actions of the Custodian in the instant complaint have not amounted to a knowing and willful violation of OPRA; to the contrary, the Custodian has gone above and beyond her responsibilities under OPRA to provide the Complainant with a meaningful alternative to the nonexistent records.¹¹ Counsel argues that to find that the Custodian has knowingly and willfully violated OPRA is to suggest that she unreasonably denied access to records that did not exist.

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.

¹¹ Counsel includes specific details about concessions made by the Custodian during the mediation process. Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-113 – Findings and Recommendations of the Executive Director 6

OPRA states that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also states 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 therefore.”* (Emphasis added.) 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.¹² Thus, a custodian’s failure to respond in writing to a complainant’s OPRA

¹² 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 is required. Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-113 – Findings and Recommendations of the Executive Director 7

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, in Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council’s decision in Paff.”

The quarterly sewer bills requested in the instant complaint are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The Custodian in the instant complaint responded in writing to the Complainant on the eleventh (11th) business day after receipt of the Complainant’s OPRA request providing a copy of the “customer account record.” Although the Custodian provided records to the Complainant on said date and the Custodian’s Counsel asserted in a letter to the GRC dated March 15, 2010 that the Custodian verbally advised the Complainant that no quarterly sewer bills responsive existed at the time of disclosure of the “customer account record,” the Custodian failed to respond in writing to the request stating that no quarterly bills responsive to the Complainant’s OPRA request exist. Additionally, the Custodian in this complaint failed to respond immediately to the Complainant’s OPRA request for the requested quarterly sewer bills. As in Herron, supra, the Custodian had a duty to respond immediately because the Complainant’s OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A- 5.e.

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, supra, and DeLuca, supra. Further, because the

days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Custodian failed to immediately deny access to the requested records, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron, *supra*.

However, 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 certified in the SOI 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.

Similarly, in this complaint, the Custodian certified in the SOI that no quarterly sewer bills responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer, *supra*.

The GRC notes that both parties raised additional issues that will briefly be addressed herein.

The Complainant stated in his amended denial of access complaint that he will only accept the quarterly bills unless the PMUA certifies that the information contained in the computer printouts is accurate. However, the GRC does not have jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b. See Kwanzaa v. Department of Corrections, GRC Complaint No.2004-167 (March 2005).

Further, in a letter to the GRC dated March 15, 2010, the Custodian's Counsel contended that the because the requested records do not exist, the facts of this particular complaint can be compared to those in NJ Builders, *supra*, in which the court held that "... when a request is complex because it fails to specifically identify the documents sought, then that request is not encompassed by OPRA and OPRA deadlines do not apply." However, in Mason v. City Clerk of the City of Hoboken, 196 N.J. 51, 77 (2008), the court noted that:

"OPRA requires that an agency provide access or a denial no later than seven [7] business days after a request ... under the terms of the statute, the agency must start that process with some form of response within seven [7] business days of a request." *Id.* at 76.¹³

Based on the foregoing, it is unreasonable for a custodian to be relieved of his/her duty to respond in writing within the statutorily mandated time frame. The GRC

¹³ The GRC has consistently held that a custodian of record must respond in writing within the statutorily mandated seven (7) business days either granting access, denying access, seeking clarification or requesting an extension of time
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reinforced this principle in Pusterhofer, *supra*, in which the custodian of that complaint was found to have violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., but was found to not have unlawfully denied access to the requested records because the records requested did not exist. The GRC has applied this principle in all complaints factually similar to Pusterhofer, including the instant complaint.

Whether the Custodian’s “deemed” denial and failure to respond immediately 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 failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated time frame resulted in a “deemed” denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request for quarterly sewer bills, because the Custodian certified in the SOI that no records responsive to the Complainant’s OPRA 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.

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) and DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007). Further, because the Custodian failed to immediately deny access to the requested records, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian certified in the Statement of Information that no quarterly sewer bills responsive to the Complainant's OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing within the statutorily required time frame resulting in a "deemed" denial and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial and the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request for quarterly sewer bills, because the Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA 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.

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010