



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 27, 2010 Government Records Council Meeting

Kerwyn Pierre
Complainant

Complaint No. 2009-207

v.

Plainfield Municipal Utilities Authority (Union)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 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).
2. Because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., and because the Custodian failed to provide the Complainant access to electronic copies of the meeting minutes dated January 22, 2009, February 19, 2009 and March 17, 2009, as requested, the Custodian unlawfully denied access to said records. However, the Council need not order the Custodian to disclose said records to the Complainant since the Custodian’s Counsel stated that said records were already provided to the Complainant in electronic format, via e-mail, on June 25, 2010.
3. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing 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, and despite the Custodian’s unlawful denial of access to the requested meeting minutes because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., the Custodian’s Counsel did provide



access to the requested minutes in the medium requested on June 25, 2010. Additionally, the evidence of record suggests that the Custodian's violation of OPRA at N.J.S.A. 47:1A-5.d. was a misinterpretation of the OPRA request rather than any willful misconduct. 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.

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 July, 2010

Robin Berg Tabakin, Chair
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: July 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Kerwyn Pierre¹
Complainant**

GRC Complaint No. 2009-207

v.

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

Records Relevant to Complaint: Electronic copy of meeting minutes dated:

1. January 22, 2009
2. February 19, 2009
3. March 17, 2009³

Request Made: June 1, 2009

Response Made: June 15, 2009

Custodian: Dollie Hamlin

GRC Complaint Filed: July 2, 2009⁴

Background

June 1, 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.

June 15, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states that electronic copies of meeting minutes are not available, but that she can provide hard copies of the requested minutes if the Complainant desires.

¹ No legal representation listed on record.

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

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

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

June 17, 2009

E-mail from Complainant to Custodian. The Complainant states that his OPRA request sought copies of meeting minutes in electronic format. The Complainant states that OPRA mandates custodians to provide access to records in the requested medium. The Complainant asserts that the minutes were created electronically. The Complainant asks the Custodian to e-mail him the requested meeting minutes as soon as possible.

June 18, 2009

Memorandum from Custodian's Counsel to Custodian. The Custodian's Counsel states that regular meetings of the Plainfield Municipal Utilities Authority ("PMUA") are not required to be verbatim transcripts nor are they required to be recorded by audio cassette or other recording device. Counsel asserts that the stenographer's cassette tapes are assistance tools utilized by the stenographer for the purpose of creating the official public minutes. As such, Counsel contends that said tapes are not government records. Additionally, Counsel states that the written minutes are delivered to the PMUA in hard copy by the stenographer.

June 26, 2009

E-mail from Complainant to Custodian. The Complainant asks the Custodian to e-mail him the requested meeting minutes by the close of business or he will file a Denial of Access Complaint.

July 2, 2009

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

- Complainant's OPRA request dated June 1, 2009
- Custodian's response to the OPRA request dated June 15, 2009
- E-mail from Complainant to Custodian dated June 17, 2009
- Memorandum from Custodian's Counsel to Custodian dated June 18, 2009
- E-mail from Complainant to Custodian dated June 26, 2009

The Complainant states that he submitted his OPRA request on June 1, 2009. The Complainant states that the Custodian responded on or about June 19, 2009⁵ and denied access to electronic copies of the requested meeting minutes on the basis that minutes were not created electronically. The Complainant states that he made several attempts to obtain said records from the Custodian after her initial denial with no success.

The Complainant does not agree to mediate this complaint.

July 22, 2009

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

July 23, 2009

Custodian's SOI⁶ with the following attachments:

⁵ The Custodian's written response is dated June 15, 2009.

⁶ The Custodian's signature page is dated July 21, 2009.

- Complainant's OPRA request dated June 1, 2009
- Custodian's response to the OPRA request dated June 15, 2009
- Division of Archives and Records Management Records Retention Schedule for Municipal Utilities & Authorities

The Custodian certifies that she received the Complainant's OPRA request on June 1, 2009. The Custodian certifies that she provided the Complainant with a written response on June 15, 2009.

The Custodian's Counsel states that the PMUA does not create its formal minutes in an electronic format although stenographic equipment and a cassette recorder are used by the transcriber to assist her in preparing the minutes. However, Counsel contends that the stenographic paper and cassette tape are not government records.

Counsel contends that a government agency does not have to create records to satisfy an OPRA request. Thus, Counsel states that the Custodian offered the Complainant a hard copy of the requested meeting minutes.

Counsel states that the cassette tape made by the transcriber to assist her no longer exists and therefore cannot be provided. Counsel states that the Complainant refuses to accept the requested meeting minutes in the only format in which they are required to be made – a non-verbatim summary of the meeting pursuant to the Open Public Meetings Act.⁷

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, meeting minutes must be maintained permanently, and may be archived.

July 23, 2009

The Complainant's response to the Custodian's SOI. The Complainant states that he is appalled at the misinterpretation of the term "electronic format." The Complainant states that his request was not for any cassette recording or stenograph. The Complainant states that he sought to have the meeting minutes e-mailed. The Complainant states that "electronic format" meant the format in which the minutes were created, such as a Word document or PDF. The Complainant states that if the meeting minutes are available in hard copy, he finds it very hard to believe that they were created on a typewriter instead of a computer.

March 24, 2010

Letter from Custodian's Counsel to Complainant. Counsel states that he has again reviewed the Complainant's OPRA request, Denial of Access Complaint, and other correspondence between the Complainant and Custodian. Counsel states that there

⁷ Counsel makes an in-depth legal argument regarding the non-disclosure of the stenographic paper and cassette; however, said argument is not relevant to the adjudication of this complaint since the requested records are electronic *copies* of the formal written meeting minutes, not for an audio recording of said meetings.

appears to be a misunderstanding regarding the electronic records sought. Counsel states that the Custodian believed the Complainant's request sought an electronic verbatim record of the public meetings. However, Counsel states that he believes the Complainant originally sought the Custodian to convert the hard copy of the meeting minutes into an electronic format which could be transmitted via e-mail. As such, Counsel asks the Complainant to confirm whether he wishes for the Custodian to scan the hard copy meeting minutes and e-mail said minutes to the Complainant. If so, Counsel states that the Custodian will transmit said minutes to the Complainant immediately.

July 6, 2010

Letter from Custodian's Counsel to GRC. The Custodian's Counsel states that the meeting minutes requested by the Complainant dated January 22, 2009, February 19, 2009 and March 17, 2009 were provided to the Complainant in electronic format on June 25, 2010, via e-mail. As such, Counsel requests that this complaint be dismissed.

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 mandates that:

"[a] custodian shall permit access to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, *the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.*" (Emphasis added.) N.J.S.A. 47:1A-5.d.

Further, OPRA provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian *shall delete or excise from a copy of the record that portion* which the

custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA also states 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.⁸ 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 this instant complaint, the Custodian certified that she received the Complainant’s OPRA request on June 1, 2009. The Custodian certified that she provided a written response on June 15, 2009, the tenth (10th) business day following the receipt of said request, in which the Custodian denied the Complainant’s request for electronic

⁸ 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.

copies of the requested meeting minutes but offered the Complainant access to said minutes in hard copy.

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.

The Custodian's Counsel stated that the Custodian denied the Complainant access to electronic copies of meeting minutes because the PMUA does not create its formal minutes through an electronic format, although stenographic equipment and a cassette recorder are used by the transcriber to assist her in preparing the minutes. However, Counsel contends that the stenographic paper and cassette tape are not government records. In a letter to the Complainant dated March 24, 2010, Counsel admits that the PMUA misunderstood the Complainant's OPRA request as seeking an electronic verbatim record of the requested meetings, such as an audiotape, rather than an electronic transmittal of the official written meeting minutes.

OPRA provides that custodians must provide access to records in the medium requested. N.J.S.A. 47:1A-5.d. Here, the Complainant sought access to electronic copies of meeting minutes. The Custodian misunderstood the Complainant's request as seeking copies of audiotapes of said meetings. However, the Complainant clarified that he sought to have the electronic minutes e-mailed to him in two (2) e-mails to the Custodian dated June 17, 2009 and June 26, 2009. The Custodian did not provide the Complainant with the requested records in the medium requested until June 25, 2010.

Therefore, because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., and because the Custodian failed to provide the Complainant access to electronic copies of the meeting minutes dated January 22, 2009, February 19, 2009 and March 17, 2009, as requested, the Custodian unlawfully denied access to said records. However, the Council need not order the Custodian to disclose said records to the Complainant since the Custodian's Counsel stated that said records were already provided to the Complainant in electronic format, via e-mail, on June 25, 2010.

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.

The Custodian certified that she received the Complainant’s OPRA request on June 1, 2009. The Custodian certified that she provided a written response on June 15, 2009, the tenth (10th) business day following the receipt of said request, in which the Custodian denied the Complainant’s request for electronic copies of the requested meeting minutes but offered the Complainant access to said minutes in hard copy. In a letter to the Complainant dated March 24, 2010, Counsel admits that the PMUA misunderstood the Complainant’s OPRA request as seeking an electronic verbatim record of the requested meetings, such as an audiotape, rather than an electronic transmittal of the official written meeting minutes. Further, in a letter to the GRC dated July 6, 2010, the Custodian’s Counsel stated that said records were provided to the Complainant in electronic format, via e-mail, on June 25, 2010.

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 violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing 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, and despite the Custodian’s unlawful denial of access to the requested meeting minutes because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., the Custodian’s Counsel did provide access to the requested minutes in the medium requested on June 25, 2010. Additionally, the evidence of record suggests that the Custodian’s violation of OPRA at N.J.S.A. 47:1A-5.d. was a misinterpretation of the OPRA request rather than any willful misconduct. 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.

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. Because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., and because the Custodian failed to provide the Complainant access to electronic copies of the meeting minutes dated January 22, 2009, February 19, 2009 and March 17, 2009, as requested, the Custodian unlawfully denied access to said records. However, the Council need not order the Custodian to disclose said records to the Complainant since the Custodian's Counsel stated that said records were already provided to the Complainant in electronic format, via e-mail, on June 25, 2010.
3. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing 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, and despite the Custodian's unlawful denial of access to the requested meeting minutes because custodians are obligated to provide access to requested records in the medium requested pursuant to N.J.S.A. 47:1A-5.d., the Custodian's Counsel did provide access to the requested minutes in the medium requested on June 25, 2010. Additionally, the evidence of record suggests that the Custodian's violation of OPRA at N.J.S.A. 47:1A-5.d. was a misinterpretation of the OPRA request rather than any willful misconduct. 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.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010