



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

Pauline A. Higgins
Complainant

Complaint No. 2010-25

v.

Township of Montclair (Essex)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 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 did not provide a written response the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Complainant’s failure to provide a written response to the Complainant’s request results in a “deemed” denial 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 the Custodian submitted no evidence to substantiate the delay in providing access to scanned images of the requested tax maps, the Custodian has failed to bear her burden of proving that the delay in access was lawful. N.J.S.A. 47:1A-6; *see also* Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (February 2008)(Custodian failed to bear burden of proving that special service charge representing administrative costs of learning to operate computerized 911 system were reasonable).
3. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request for geo referenced tax maps and/or Parcel Layers exist, and there is no credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.



4. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days of receipt of such request, which resulted in a violation of N.J.S.A. 47:1A-5.g., and unlawfully delayed providing access to scanned images of the requested tax maps, the Custodian provided access to all records responsive which existed to the Complainant on March 1, 2010, and certified that no records responsive to the request for geo referenced tax maps or Parcel Layers existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, it is concluded that the Custodian has not knowingly and willfully denied the Complainant access to the requested records.

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 26th Day of October, 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: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Pauline A. Higgins¹
Complainant**

GRC Complaint No. 2010-25

v.

**Township of Montclair (Essex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

- Digital Image of Tax Maps for the Township of Montclair
- Geo Referenced Tax Maps
- Parcel Layers

Request Made: November 25, 2009

Response Made: None

Custodian: Linda S. Wanat

GRC Complaint Filed: February 17, 2010³

Background

November 25, 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.

February 17, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC").⁴ The Complainant asserts that the Custodian did not respond to the OPRA request.

The Complainant agrees to mediate this complaint.

¹ Formerly represented by Robert Blau, Esq., (Springfield, NJ). As of September 15, 2010, Mr. Blau no longer represents the Complainant.

² Represented by Alan G. Trembulak, Esq. (Montclair, NJ).

³ The GRC received the Denial of Access Complaint on February 18, 2010.

⁴ The Complainant submitted no attachments to the GRC as part of the Denial of Access Complaint, nor were there any legal arguments made.

March 1, 2010⁵

Letter from the Custodian's Counsel to the Complainant, enclosing a copy of a compact disk containing scanned images of Township tax maps.

March 25, 2010

Offer of Mediation sent to the Custodian. The Custodian did not respond to the Offer of Mediation.

May 7, 2010

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

June 9, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 7, 2010 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

June 14, 2010

Custodian's SOI attaching Complainant's OPRA request dated November 25, 2009.⁶

The Custodian certifies that a compact disk with scanned copies of all tax maps was provided by Custodian's Counsel to the Complainant on March 1, 2010. The Custodian further certifies that no records exist which are responsive to the request for geo-referenced tax maps or Parcel Layers.

The Custodian certifies that upon receipt of the OPRA request, she forwarded copies of the request to applicable Township departments, as well Custodian's Counsel, asking whether the records in question were maintained by any of the Township departments. The Custodian certifies that Custodian's Counsel communicated with the Township department heads and was advised that the Township does not have the requested geo-referenced tax maps or Parcel Layers. The Custodian certifies that Custodian's Counsel arranged for the preparation of the compact disk containing scanned images of the Township tax maps after discussions with the Complainant.

September 1, 2010

E-mail from the GRC to the Custodian and the Custodian's Counsel. The GRC requests that the Custodian provide a copy of the March 1, 2010 letter that was sent to the Complainant with the compact disk.⁷

⁵ Neither the Complainant nor the Custodian attached a copy of said letter. However, the Custodian certified to the provision of such letter in the SOI and the Complainant has submitted no evidence to refute said certification.

⁶ The Custodian provided no information regarding the agency's records retention period or destruction schedule as established and approved by the New Jersey Department of State, Division of Archives and Records Management.

⁷ The Custodian did not respond to the GRC's request for the March 1, 2010 letter.

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 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).

Here, the Custodian did not provide a written response the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Complainant’s failure to provide a written response to the Complainant’s request results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley.

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.

Moreover, the evidence of record indicates that, in response to the Complainant's OPRA request dated November 25, 2009, Custodian's Counsel provided a disk to the Complainant on March 1, 2010 which contained scanned images of the requested tax maps. The Custodian has submitted no evidence to substantiate this delay. Thus, the Custodian has failed to bear her burden of proving that the delay in access was lawful. N.J.S.A. 47:1A-6; see also Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (February 2008)(Custodian failed to bear burden of proving that special service charge representing administrative costs of learning to operate computerized 911 system were reasonable).

However, the Custodian has certified in the SOI that no records responsive to the request for geo referenced tax maps and/or Parcel Layers exist.

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 Complainant submitted evidence to refute the Custodian's certification. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed and there was no evidence in the record to refute the Custodian's certification.

Accordingly, because the Custodian has certified that no records responsive to the Complainant's OPRA request for geo referenced tax maps and/or Parcel Layers exist, and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer, the Custodian has not unlawfully denied the Complainant access to these requested records. N.J.S.A. 47:1A-6.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days of receipt of such request, which resulted in a violation of N.J.S.A. 47:1A-5.g., and unlawfully delayed providing access to scanned images of the requested tax maps, the Custodian provided access to all records responsive which existed to the Complainant on March 1, 2010, and certified that no records responsive to the request for geo referenced tax maps or Parcel Layers existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, it is concluded that the Custodian has not knowingly and willfully denied the Complainant access to the requested records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not provide a written response the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. Accordingly, the Complainant's failure to provide a written response to the Complainant's request results in a "deemed" denial 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 the Custodian submitted no evidence to substantiate the delay in providing access to scanned images of the requested tax maps, the Custodian has failed to bear her burden of proving that the delay in access was lawful. N.J.S.A. 47:1A-6; *see also* Rivera v. Town of Guttenberg, GRC Complaint No. 2006-154 (February 2008)(Custodian failed to bear burden of proving that special service charge representing administrative costs of learning to operate computerized 911 system were reasonable).
3. Because the Custodian has certified that no records responsive to the Complainant's OPRA request for geo referenced tax maps and/or Parcel Layers exist, and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not

unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

4. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days of receipt of such request, which resulted in a violation of N.J.S.A. 47:1A-5.g., and unlawfully delayed providing access to scanned images of the requested tax maps, the Custodian provided access to all records responsive which existed to the Complainant on March 1, 2010, and certified that no records responsive to the request for geo referenced tax maps or Parcel Layers existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, it is concluded that the Custodian has not knowingly and willfully denied the Complainant access to the requested records.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010