



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 Higgins
Complainant

Complaint No. 2010-27

v.

Township of West Orange (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 amended 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. The delay in access to the requested digital images of tax maps which resulted from the Township’s attempt to convert the records into the medium sought by the Complainant is not reasonable under OPRA. *See* 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). Thus, the Custodian has failed to bear her burden of proving that the delay in access to the requested digital images of tax maps was lawful. N.J.S.A. 47:1A-6.
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 geo referenced tax maps and/or Parcel Layers. 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 access to the requested scanned images of tax maps, the Custodian provided 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'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 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 Higgins¹
Complainant**

GRC Complaint No. 2010-27

v.

**Township of West Orange (Essex)²
Custodian of Records**

Records Relevant to Complaint:

Copies of:

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

Request Made: December 15, 2009

Response Made: None

Custodian: Karen J. Carnevale

GRC Complaint Filed: February 17, 2010³

Background

December 15, 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.⁴

December 28, 2009

Memorandum from Leonard Lepore, Municipal Engineer and Director of Public Works, to the Custodian. Mr. Lepore states that he has no records which are responsive to the Complainant's OPRA request.

February 17, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching Complainant's OPRA request dated December 15, 2009. The Complainant asserts that the Custodian did not respond to his OPRA request.

The Complainant agrees to mediate this complaint.

¹ No longer represented by Robert Blau, Esq. of Blau & Blau (Springfield, NJ), as of September 15, 2010.

² Represented by Kenneth Kayser, Esq., (Livingston, NJ).

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

⁴ The Complainant's OPRA request lists three specific records, while the Denial of Access Complaint lists only tax maps.

February 19, 2010

E-mail from Custodian's Counsel to Complainant's Counsel. Custodian's Counsel states that his contact information and preferences are listed at the bottom of the e-mail. Custodian's Counsel also states that he will be available by cell phone Monday afternoon to discuss the Complainant's OPRA request with Complainant and Complainant's Counsel. Custodian's Counsel states that Shane at the Tax Assessor's Office has indicated that she has an ARC VIEW software program on the computer in her office; Shane is not sure what the Complainant desires, or how to get the requested records out of the computer and into a form useable by the Complainant, but Shane is willing to help resolve this matter. Custodian's Counsel states that Lenny Lepore, the Municipal Engineer, does not have any records responsive to the OPRA request, but was instrumental in finding and dealing with the vendor who will be doing the digital geo referenced tax maps for the Township during the course of this year. Custodian's Counsel states that the Township expects to receive the digital geo referenced tax maps toward the end of the year. Custodian's Counsel states that the Township has no such maps now.

February 22, 2010

E-mail from Leonard Lepore to Custodian's Counsel. Mr. Lepore attaches an e-mail from Richard Rehmann, Civil Solutions, containing contact information for Mr. Rehmann.

February 22, 2010

E-mail from Leonard Lepore to Richard Rehmann, Civil Solutions. Mr. Lepore states that West Orange's Assistant Township Attorney, Ken Kayser, will contact Mr. Rehmann shortly regarding copying a file of geo-referenced tax map and parcel data which is in the possession of the Township's Tax Assessor in order to fulfill the Complainant's OPRA request.

February 22, 2010

E-mail from Custodian's Counsel to Complainant's Counsel. Custodian's Counsel states that the Tax Assessor's Office has a computer program called Arc GIS 9 (ArcMap). Custodian's Counsel states that it appears that the program contains diagrams rather than maps, but Len Lepore has stated that these are digital maps not yet approved by the State of New Jersey. Custodian's Counsel states that the maps do show tax lots, streets, etc., but do not appear to be to scale. Custodian's Counsel states that when the new geo maps are done later this year, they will be approved by the State and will be true digital maps. Custodian's Counsel states that the ArcMap program is a creation of Civil Solution, a division of ARH, and the contact person there is Richard Rehmann. Custodian's Counsel states that he will contact Mr. Rehmann to obtain his advice as to how the records requested can be provided because the Tax Assessor's employees did not know. Custodian's Counsel states that ARH is the same company that the Township is hiring to do the digital geo mapping of the Township this year as part of the revaluation process. Custodian's Counsel also states that he has been advised that the Township does not require an OPRA request to provide tax maps but usually provides same upon a simple verbal request. Custodian's Counsel states that OPRA complaints filed with the GRC require a quick response and the provision of some detailed information from the Township. Custodian's Counsel states that the GRC will generally require a signed letter

of withdrawal for complaints which the parties have settled. Custodian's Counsel states that the Township has no objection to the request and the failure to respond was an oversight by a Clerk's Office employee rather than a rejection. Custodian's Counsel states that if the parties cannot resolve this matter soon, he will have to prepare and submit a response to the Denial of Access Complaint at the GRC. Custodian's Counsel asks Complainant's Counsel to confirm with the Complainant that a settlement has been reached so that Custodian's Counsel knows how to respond.

February 22, 2010

Memorandum from Madelyn Longo to the Custodian. Ms. Longo states that on December 17, 2009, she forwarded a copy of the Complainant's OPRA request to the Tax Assessor and the Engineering Department. Ms. Longo further states that she followed up on the request with Shayne Radice of the Tax Assessor's Office and Tina Dello Russo of the Engineering Department, both of whom indicated to Ms. Longo that copies of the tax maps were not available in the requested format and would not be available in digital format for the foreseeable future. Ms. Longo states that Ms. Radice and Ms. Dello Russo informed her that only small map parts have been scanned digitally. Ms. Longo further states that Ms. Radice and Ms. Dello Russo informed her that they would be willing to speak to the Complainant to explain the unavailability of the special process maps and to assist in providing any alternate maps to her. Ms. Longo also states that Leonard Lepore, Director, has informed her via a memorandum dated December 28, 2009 that he does not have any information responsive to the Complainant's OPRA request. Ms. Longo also states that it was her responsibility to track the progress of the Complainant's OPRA request through the Clerk's Office and that she should have been more diligent about doing so.

February 23, 2010

E-mail from Custodian's Counsel to Richard Rehmann, Civil Solutions. Custodian's Counsel states that he needs to speak with Mr. Rehmann regarding an OPRA request which seeks "current geo referenced tax maps, parcel layers, scanned images of tax maps, any format." Custodian's Counsel states that it is his understanding per Mr. Lepore that the Township does not have such maps but that ARH will be providing them per contract later this year. Custodian's Counsel also states that he understands that the Arc GIS 9 program in the Tax Assessor's Office may provide similar information or data which may satisfy the Complainant. Custodian's Counsel states that he viewed the program at the Tax Assessor's Office yesterday and the secretaries do not know how to download the information data contained in the program for delivery to and use by third parties. Custodian's Counsel asks Mr. Rehmann to advise as soon as possible how this may be accomplished because the Township is under strict, short deadlines to respond. Custodian's Counsel states that the Township believes that the information is public records disclosable under OPRA and would like to settle the issue and have the Complainant withdraw the Denial of Access Complaint.

February 24, 2010

E-mail from Richard Rehmann, Civil Solutions, to Custodian's Counsel. Mr. Rehmann asks if Custodian's Counsel would like a CD containing a copy of the data that Civil Solutions had delivered to the Township, and states that he has scanned images of the tax maps which were created in 2003 and a GIS parcel layer. Mr. Rehmann states that

such maps are not current to present day field conditions, but they are the most current that they have that have been delivered to the Township. Mr. Rehmann states that Civil Solutions is working on a digital tax mapping project for the Township which involves creating the digital geo referenced tax maps mentioned but that this project is not complete. Mr. Rehmann states that in connection with that project, the tax map set has been scanned again, and further states that he can send those more current maps as well. Mr. Rehmann states that he wants to be clear that the maps have not yet been officially delivered to the Township, in case that status is important.

February 24, 2010

E-mail from Richard Rehmann to West Orange Tax Assessor. Mr. Rehmann states that he has spoken to Custodian's Counsel and the plan is that Mr. Rehmann will talk the Tax Assessor's Office employees through copying the requested records from the computer system to a compact disk. Mr. Rehmann states that he will call soon and asks that the Tax Assessor's Office provide him with times that they are available for this process.

February 25, 2010

E-mail from Richard Rehmann to Custodian's Counsel. Mr. Rehmann states that he helped Shane with copying the requested data to a directory that she was going to use to burn a CD. Mr. Rehmann states that the directory contained the GIS parcel layer and TIF image tax maps held currently in the Township's GIS. Mr. Rehmann states that while that data is not exactly representative of current field conditions, it is the current version that the Township has at this point. Mr. Rehmann states that the Township does not have geo referenced tax maps at this time.

February 25, 2010

E-mail from Custodian's Counsel to Richard Rehmann. Custodian's Counsel states that he picked up the disk with the data from the Assessor's Office late on the previous afternoon.

March 1, 2010

Letter from Custodian's Counsel to the Complainant. Custodian's Counsel states that a CD is enclosed which contains scanned images of the requested tax maps.

Custodian's Counsel states that he recently received a copy of the Complainant's Denial of Access Complaint from the Township Clerk's office. Custodian's Counsel further states that he immediately contacted Complainant's Counsel but was not able to speak with him about resolving this matter. Custodian's Counsel states that he wishes to resolve this matter quickly and avoid the need for a formal response and processing of the Denial of Access Complaint through the GRC, which he believes will be both cumbersome and wasteful. Custodian's Counsel states that the Township has no disagreement about producing the requested records.

Custodian's Counsel states that the Complainant's OPRA request was initially handled by Madelyn Longo, an employee of the Clerk's office, who routed the request to the Tax Assessor and Engineering Department on December 17, 2009. Custodian's Counsel further states that Ms. Longo spoke to employees of each of those offices who

advised her that the requested tax maps were not available in the requested format, but would be available at some future time. Custodian's Counsel states that the Tax Assessor and Engineering Department employees offered to speak with the Complainant to explain what the Township had and to assist in providing alternative maps. Custodian's Counsel also states that Ms. Longo was supposed to track the Complainant's OPRA request through the process, but that she obviously failed to do so.

Custodian's Counsel states that upon receipt of the Denial of Access Complaint, the Custodian and Counsel began to investigate further and discovered that the Township does not currently have geo referenced digital tax maps, but has recently entered into a contract with Civil Solutions, a division of ARH, to prepare such maps. Custodian's Counsel states that the new maps being developed would meet the Complainant's request but will not be ready until later in the Summer or Fall. Custodian's Counsel further states that the maps are being prepared in anticipation of the Township's revaluation to take place next year. Custodian's Counsel states that the Custodian determined that it has been the Township's practice to provide tax maps when requested by telephone without the need for an ORPA request. Custodian's Counsel states that he went to the Assessor's Office and observed the Arc GIS 9 program which appeared to provide at least in part the information which the Complainant sought, but not digitally geo referenced maps approved by the State of New Jersey, which will not be available until about the fourth quarter of 2010.

Custodian's Counsel states that the Assessor's Office did not have sufficient computer knowledge and skill to get the data from the Arc program onto a disk, so Custodian's Counsel contacted Richard Rehmann of Civil Solutions and asked him to assist the Assessor's Office personnel in accomplishing the transfer of data. Custodian's Counsel states that Mr. Rehmann did so last week and the Assessor's Office provided Custodian's Counsel with the CD which he is forwarding to the Complainant with this letter. Custodian's Counsel states that he loaded the disk onto his computer and was able to access the tax maps without difficulty; Custodian's Counsel states that he assumes that the Complainant will be able to do the same. Custodian's Counsel states that if the Complainant still wants copies of digital geo referenced tax maps when such maps are ready, the Complainant should be able to obtain same through the Tax Assessor's Office or the Municipal Engineer's Office by simply telephoning them and requesting such records without the need to file an OPRA request.

Custodian's Counsel asks that the Complainant have her attorney contact him and that he would appreciate it if the Complainant would withdraw the instant Denial of Access Complaint. Custodian's Counsel states that the Township has no objection to producing the requested records and the failure to produce them on a more timely basis was due simply to the failure of Ms. Longo to properly follow up on the OPRA request. Custodian's Counsel apologizes for this and again asks the Complainant to withdraw the instant complaint.

March 1, 2010

E-mail from Custodian's Counsel to the Complainant. Custodian's Counsel states that he is attaching a PDF copy of a letter mailed to the Complainant with a CD enclosed

containing the requested scanned images of tax maps. Custodian's Counsel states that the letter and CD should arrive in the next day's mail, and if not, then the following day.

March 25, 2010

Offer of Mediation sent to the Custodian.

March 30, 2010

The Custodian agrees to mediate this complaint.⁵

May 10, 2010

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

May 14, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 15, 2009
- Memorandum from Leonard R. Lepore, Municipal Engineer, to Custodian dated December 28, 2009
- Complainant's Denial of Access Complaint dated February 17, 2010
- E-mail from Custodian's Counsel to Complainant's Counsel dated February 19, 2010
- E-mail from Leonard Lepore to Custodian's Counsel dated February 22, 2010
- E-mail from Leonard Lepore to Richard Rehmann, Civil Solutions, dated February 22, 2010
- E-mail from Custodian's Counsel to Complainant's Counsel dated February 22, 2009
- Memorandum from Madelyn Longo to Custodian dated February 22, 2010
- E-mail from Custodian's Counsel to Richard Rehmann dated February 23, 2010
- E-mail from Richard Rehmann to Custodian's Counsel dated February 24, 2010
- E-mail from Richard Rehmann to West Orange Tax Assessor dated February 24, 2010
- E-mail from Richard Rehmann to Custodian's Counsel dated February 25, 2010
- E-mail from Custodian's Counsel to Richard Rehmann dated February 25, 2010
- Letter from Custodian's Counsel to Complainant dated March 1, 2010
- E-mail from Custodian's Counsel to Complainant dated March 1, 2010

On behalf of the Custodian, Custodian's Counsel states that the Custodian received the Complainant's Denial of Access Complaint on the morning of February 18, 2010 and notified Custodian's Counsel of receipt of same. Custodian's Counsel states that he then telephoned the Complainant's Counsel and asked Complainant's Counsel to contact the Complainant so that this matter could be resolved without the need to engage in litigation before the GRC. Custodian's Counsel states that he followed up this call with an e-mail to Complainant's Counsel that summarized what he had learned up to that point regarding the requested records.

⁵ The evidence is unclear as to when this case was referred back from mediation.

Custodian's Counsel states that on February 22, 2010, he received a copy of Ms. Longo's memorandum to the Custodian dated February 22, 2010. Custodian's Counsel states that he contacted Len Lepore, Municipal Engineer, by telephone and explained the need for technical assistance to obtain the requested tax maps. Custodian's Counsel states that Mr. Lepore advised him of the name and contact information for Mr. Richard Rehmann of Civil Solutions, the firm hired to provide the Township with digital geo referenced tax maps. Custodian's Counsel further states that earlier that day, he went to the Assessor's Office to see what records they might have that were responsive to the Complainant's OPRA request.

Custodian's Counsel states after he returned from the Assessor's Office, he sent an e-mail to the Complainant's Counsel advising him of what he had learned and explained to him that Civil Solutions had been hired to provide tax maps, but that such maps would not be available until later in the year. Custodian's Counsel states that he did instruct Complainant's Counsel that the Township did have the digital tax maps of lesser quality and that he would provide those after following up with Mr. Rehmann the next morning to determine how those maps could be provided.

Custodian's Counsel states that on February 23, 2010, he contacted Mr. Rehmann to obtain assistance in downloading the requested information to a computer disk. Custodian's Counsel states that he picked up a computer disk that contained the requested scanned images of tax maps from the Assessor's Office. Custodian's Counsel states that on February 25, 2010, Mr. Rehmann sent him an e-mail stating that he had assisted an employee at the Assessor's Office with copying the data to a directory from which she would burn a CD with documents which were "as close to compliant" with the OPRA request as the Township could provide. Custodian's Counsel then states that he sent, along with the disc, a letter to the Complainant explaining the history of the OPRA request and enclosing the disk containing the requested scanned images of tax maps.

Custodian's Counsel states that the Township does not understand the need for further litigation in this matter. He states that the Township has supplied what it has and can provide nothing else. He asserts that this is not a case in which a third party has what the requestor wants and it is not being provided. *See, Burnett v. County of Gloucester*, Docket No. A-4329-08T3, decided on May 10, 2010 (App. Div.). Custodian's Counsel maintains the instant case is more akin to *Bent v. Twp. of Stafford Police Dep't.*, 381 N.J. Super 30 (App. Div. 2005), in which the court stated: "to the extent [the] request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all." *Id.* at 38.

Custodian's Counsel maintains that the Township does not have records which are precisely what was sought in the OPRA request. Custodian's Counsel further maintains that such documents do not exist, but are in the process of being prepared for the Township by Civil Solutions. Additionally, Custodian's Counsel asserts that he has heard nothing further from the Complainant since sending the computer disk containing the township's tax maps in digital, but not geo referenced, format.

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.⁶ 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 to 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

⁶ 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.

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.

Moreover, the evidence of record indicates that, in response to the Complainant's OPRA request dated December 15, 2009, Custodian's Counsel provided a disk to the Complainant on March 1, 2010 which contained scanned images of the requested tax maps. The evidence of record indicates that the delay in access was due in part to the efforts of the Township to convert the existing tax map images to a version which could be saved on a disk and provided to the Complainant.

However, if the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's OPRA request, the Custodian should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew that he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a "deemed" denial of the request.

Moreover, the delay in access to the requested digital images of tax maps which resulted from the Township's attempt to convert the records into the medium sought by the Complainant is not reasonable under OPRA. See 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). Thus, the Custodian has failed to bear her burden of proving that the delay in access to the requested digital images of tax maps was lawful. N.J.S.A. 47:1A-6.

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 to 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 the requested geo referenced tax maps and/or Parcel Layers. 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 access to the requested scanned images of tax maps, the Custodian provided 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’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 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. The delay in access to the requested digital images of tax maps which resulted from the Township's attempt to convert the records into the medium sought by the Complainant is not reasonable under OPRA. See 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). Thus, the Custodian has failed to bear her burden of proving that the delay in access to the requested digital images of tax maps was lawful. N.J.S.A. 47:1A-6.
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 geo referenced tax maps and/or Parcel Layers. 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 access to the requested scanned images of tax maps, the Custodian provided 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'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: Darryl C. Rhone
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Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010