



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. 2010-28

v.

Township of Millburn (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 Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof 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 evidence of record indicates that the delay in access to the requested digital images of tax maps was caused in part by the personal problems experienced by the Custodian; and because OPRA contains no provisions which permit non-compliance as a result of such problems, the Custodian has failed to establish that the delay in access to the requested scanned images of tax maps is supported by the law. N.J.S.A. 47:1A-6.
3. Because the Assistant Township Engineer, Ms. Annoni, has certified that the Township is not in possession of any additional records responsive to the Complainant’s OPRA request, 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 31, 2010, and the Assistant Township Engineer, Ms. Annoni, certified that no records responsive to the request for geo referenced tax maps or Parcel Layers exist 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. 2010-28

v.

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

Records Relevant to Complaint:

Copies of:

- Scanned Images of Tax Maps
- Geo Referenced Tax Maps
- Parcel Layers

Request Made: November 25, 2009

Response Made: None

Custodian: Joanne M. Monarque

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.⁴

February 17, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC"). The Complainant states that the Custodian never responded to her 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 Christopher Falcon, Esq., Maraziti, Falcon, & Healey (Short Hills, NJ).

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

⁴ The Custodian did not respond to the Complainant's OPRA request.

March 25, 2010

Offer of mediation sent to the Custodian. The Custodian did not respond to the offer of mediation.

March 26, 2010

E-mail from the Custodian to the GRC. The Custodian asserts that she has contacted the Complainant and prepared a CD of the scanned images of the tax maps requested. The Custodian states that she is still awaiting payment for this CD. The Custodian states that the request was received on November 30, 2010 and logged in and sent to the Tax Assessor's Office since the request sought digital images of tax maps. The Custodian states that the Tax Assessor's assistant sent the request to the Township Engineer's Office.

The Custodian states that personal problems distracted her from following up with the progress on the Complainant's request. The Custodian states that the death of a family member kept her out of the office and that end of the year preparations for a reorganization meeting also kept her distracted. The Custodian further asserts that when she did get back on her routine, the Engineering Department's Building was under renovation and this required her to make another copy of the request. The Custodian maintains that the Assistant Township Engineer called the Complainant on March 1, 2010 and explained that the Township did not have the requested records, but would copy each tax map on a CD for her. The Custodian states that the Complainant said this would be fine.

The Custodian maintains that once she received the CD, she sent a letter dated March 15, 2010 letter to the Complainant stating the fee for the CD and that as of the date of this letter had yet to receive payment for the CD. The Custodian states that access to the requested records was never denied, only delayed.

March 31, 2010

Letter from the Complainant to the Custodian. The Complainant states that he has enclosed a check to cover the cost of his request for the Millburn Township Tax Maps CD.

March 31, 2010

Letter from the Custodian to the GRC attaching a letter from the Complainant to the Custodian dated March 31, 2010. The Custodian states that she received payment from the Complainant for the CD provided and hopes that the instant matter can be closed.

June 9, 2010

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

June 14, 2010

Custodian's SOI attaching the Complainant's OPRA request dated November 25, 2009.

The Custodian certifies that the request was received on November 30, 2009 and that she forwarded it to the Assessor's Office because it was believed that they might have been in possession of the requested information. The Custodian states that the Assessor's Office then sent the request to the Engineering Department, but that the Custodian was not informed of this at the time when this forwarding took place.

The Custodian certifies that a response to the OPRA request was not made until March 1, 2010, by the Engineering Department since that was the department that had the requested records. The Custodian certifies that personal problems that she was dealing with prevented her from following up on the Complainant's request. The Custodian certifies that the Assistant Engineer called the Complainant on March 1st and explained that they were not in possession of scanned images of the requested information, but did agree upon a submission of a CD that contained other requested information (i.e. scanned images of tax maps). The Custodian certifies that the Complainant stated that this would be fine.

The Custodian certifies that on March 15, 2010, a letter was sent to the Complainant notifying her that the CD was ready; and that on March 31, 2010, the Complainant sent a check for the CD and that the CD was forwarded to the Complainant. The Custodian argues that the records have never been denied and were only delayed.

September 15, 2010

Letter from the GRC to the Custodian. The GRC requests that the Custodian provide certification as to when the CD with the requested records was sent to the Complainant and what the substance of the accompanying letter is.

September 15, 2010

Letter from Martha C. Annoni, Assistant Township Engineer, to the GRC. Ms. Annoni certifies that on March 1, 2010, she spoke to the Complainant and it was agreed that Ms. Annoni would provide a CD containing the scanned images of the official tax maps of the Township. Ms. Annoni certifies that the requested parcel layers and the geo referenced tax maps are not available or maintained by the Township. Ms. Annoni further certifies that the CD was provided to the Custodian on March 15, 2010.

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.⁵ 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 within the statutorily mandated seven (7) business days of receipt thereof. Accordingly, the Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof 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 personal problems experienced by the Custodian during the pendency of the request.

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

⁵ 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.

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 is not reasonable under OPRA. The evidence of record indicates that such delay was caused in part by the personal problems experienced by the Custodian; however, OPRA contains no provisions which permit non-compliance as a result of such problems. The Custodian has, therefore, failed to establish that the delay in access to the requested scanned images of tax maps is supported by the law. N.J.S.A. 47:1A-6.

However, the Assistant Township Engineer, Ms. Annoni, has certified 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 no 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 credible evidence to the contrary in the record.

Accordingly, because Ms. Annoni has certified that the Township is not in possession of any additional records responsive to the Complainant's OPRA request, 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,

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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).

Here, although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to respond to the OPRA request in writing within the statutorily mandated seven (7) business days, and unlawfully delayed access to the requested scanned images of tax maps, the evidence of record indicates that the Custodian reached an agreement with the Complainant to provide a CD containing scanned images of the requested tax maps, and the Assistant Township Engineer, Ms. Annoni, has certified that records responsive to the request for Parcel Layers and Geo Referenced tax maps do not exist. 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 Complainant’s failure to provide a written response to the Complainant’s request within the statutorily mandated seven (7) business days of receipt thereof 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 evidence of record indicates that the delay in access to the requested digital images of tax maps was caused in part by the personal problems experienced by the Custodian; and because OPRA contains no provisions which permit non-compliance as a result of such problems, the Custodian has failed to establish that the delay in access to the requested scanned images of tax maps is supported by the law. N.J.S.A. 47:1A-6.
3. Because the Assistant Township Engineer, Ms. Annoni, has certified that the Township is not in possession of any additional records responsive to the Complainant’s OPRA request, 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 31, 2010, and the Assistant Township Engineer, Ms. Annoni, certified that no records responsive to the request for geo referenced tax maps or Parcel Layers exist 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
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010