



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Robert E. Nolan
Complainant

Complaint No. 2011-229

v.

West Milford Municipal Utilities Authority (Passaic)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 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 timely respond to the Complainant’s OPRA request. As such, 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 (Interim Order October 31, 2007).
2. The Custodian certified in the Statement of Information that no responsive meeting notice exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested meeting notice pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010).
3. Although the Custodian’s failure to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s violation of OPRA does 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 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Robert E. Nolan¹
Complainant**

GRC Complaint No. 2011-229

v.

**West Milford Municipal Utilities Authority (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Copy of the meeting notice for the June 1, 2011 West Milford Municipal Utilities Authority (“MUA”) meeting held in Council chambers.

Request Made: June 2, 2011

Response Made: None

Custodian: Kelly Love

GRC Complaint Filed: July 5, 2011³

Background

June 2, 2011

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA.

July 5, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated June 2, 2011.

The Complainant states that he submitted an OPRA request to the MUA on June 2, 2011. The Complainant states that he never received a response from the MUA.

The Complainant does not agree to mediate this complaint.

July 29, 2011

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

August 4, 2011

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of time until August 12, 2011 to submit the SOI.

¹ No legal representation listed on record.

² Represented by Lisa Chadwick Thompson, Esq., of Nuzzi & Mason, LLC (Dover, NJ).

³ The GRC received the Denial of Access Complaint on said date.

August 4, 2011

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until August 12, 2011 to submit the SOI.

August 12, 2011

Custodian’s SOI attaching the Complainant’s OPRA request dated June 2, 2011.

The Custodian certifies that she did not perform a search because no record exists. The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable because no record exists.

The Custodian certifies that she received the Complainant’s OPRA request on June 3, 2011. The Custodian certifies that she did not respond because no record responsive to the Complainant’s OPRA request exists.

The Custodian states that the Complainant appears to be seeking access to a meeting notice for MUA’s appearance at the West Milford Township (“Township”) regularly scheduled June 1, 2011 meeting. The Custodian certifies that members of the MUA attended this meeting and spoke during the public comments portion of the meeting. The Custodian certifies that the members did not attend the Township’s meeting “... with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body.” N.J.S.A. 10:4-8. The Custodian certifies that MUA members made public comments and did not participate in a deliberative process with the Township. The Custodian certifies that the Complainant was not denied access to any records because no record responsive to the request exists.

August 15, 2011

Letter from the Complainant to the GRC attaching the Township’s Resolution No. 2011-272.

The Complainant asserts that the attached resolution contradicts the Custodian’s SOI certification that MUA business was not discussed at the Township’s June 1, 2011 meeting. The Complainant further contends that even if a meeting notice does not exist, the Custodian was still required to respond to his OPRA request in writing. The Complainant asserts that the Custodian never responded to his OPRA request.

Analysis

Whether the Custodian timely responded to the Complainant’s OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the

form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA 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.⁴ 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 (Interim Order October 31, 2007).

The Complainant filed the instant complaint stating that the Custodian never responded to his June 2, 2011 OPRA request. In the SOI, the Custodian certified that she received the Complainant’s OPRA request on June 3, 2011 and did not respond to same because no records responsive existed.

Therefore, the Custodian did not timely respond to the Complainant’s OPRA request. As such, 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.

Whether the Custodian unlawfully denied access to the requested meeting notice?

OPRA provides that:

⁴ 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.

“...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 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.

Although the Custodian failed to respond to the Complainant’s OPRA request, the Custodian certified in the SOI that no records responsive to said OPRA request exist. The Complainant submitted a letter to the GRC on August 15, 2011 attaching a copy of Resolution 2011-272 and arguing that said resolution contradicted the Custodian’s certification that the MUA did not discuss business at the Township’s June 1, 2011 meeting. However, this resolution does not rise to the level of competent, credible evidence sufficient to refute the Custodian’s certification that no meeting notice exists.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that no responsive meeting notice exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the requested meeting notice pursuant to Pusterhofer. *See also* Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010)(holding that although the Robert E. Nolan v. West Milford Municipal Utilities Authority (Passaic), 2011-229 – Findings and Recommendations of the Executive Director

custodian failed to respond to the complainant's OPRA request, he did not unlawfully deny access to any records because the OPRA manager certified in the SOI that no records existed).

The GRC finally notes that pursuant to its powers delineated in N.J.S.A. 47:1A-7.b., the GRC does not have the authority to adjudicate whether the MUA was required to create and publish a meeting notice under the Open Public Meetings Act. See Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).

Whether the Custodian's failure to respond rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

Although the Custodian's failure to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the

Custodian did not unlawfully deny access to the requested meeting notice because same does not exist. Pusterhofer. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's failure to respond does 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 timely respond to the Complainant's OPRA request. As such, 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 (Interim Order October 31, 2007).
2. The Custodian certified in the Statement of Information that no responsive meeting notice exists and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested meeting notice pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). *See also* Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010).
3. Although the Custodian's failure to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny access to the requested records because same do not exist. Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's violation of OPRA does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012